CANADA

Task Force on Labour Relations

Study No. 7

Trends in Industrial Relations Systems of Continental Europe

by Paul Malles
Economic Council of Canada

Privy Council Office
Ottawa

TASK FORCE ON LABOUR RELATIONS
(under the Privy Council Office)

STUDY NO. 7

TRENDS IN INDUSTRIAL RELATIONS SYSTEMS OF CONTINENTAL EUROPE

BY

PAUL MALLES

Economic Council of Canada

OTTAWA

MAY 1969

Available by mail from the Queen's Printer, Ottawa
and at the following Canadian Government bookshops

HALIFAX
1735 Barrington Street

MONTREAL
Æterna-Vie Building, 1182 St. Catherine St. West

OTTAWA
Daly Building, Corner Mackenzie and Rideau

TORONTO
221 Yonge Street

WINNIPEG
Mall Center Bldg., 499 Portage Avenue

VANCOUVER
657 Granville Street

or through your bookseller

Price: $2.50 Catalogue No.: CP32-6/1967-7

Price subject to change without notice

Queen's Printer for Canada
Ottawa, 1970

STUDIES

OF THE

TASK FORCE ON LABOUR RELATIONS

Study No.

1 Broadcasting - An Industry Study by Ruby S. Samlalsingh, M.A.

2 Professional Workers and Collective Bargaining by Shirley B. Goldenberg, M.A.

3 Syndicalisme, consommation et société de consommation par le Professeur Bernard Solasse (Laval)

4 Compulsory Arbitration in Australia by Professor J.E. Isaac (Monash)

5 Adaptation and Innovations in Wage Payment Systems in Canada by Professor Jack Chernick (Rutgers)

6 Labour Arbitration and Industrial Change by Paul C. Weiler, LL.B. (Osgoode), LL.M. (Harvard)

7 Trends in Industrial Relations Systems of Continental Europe by Paul Malles (Economic Council of Canada)

Other studies in process and to appear soon:

Labour Disputes in Essential Industries by Harry W. Arthurs, LL.B. (Toronto), LL.M. (Harvard)

Responsible Decision-Making in Democratic Trade Unions by Earl E. Palmer, A.M. (Yale), LL.M. (Toronto)

The studies of the Task Force on Labour Relations represent some of the research carried out under contract. The Task Force members do not necessarily agree with the observations and opinions expressed in these studies.

PREFACE

The terms of reference of this paper as they emerged from discussions with the members of the Task Force and its Director of Research, were: to describe present trends in the industrial relations systems of Northern and Western Continental Europe and to bring to bear, wherever possible and pertinent, the experience gained in these countries on those subjects and issues with which the Task Force intended to deal in the recommendations and conclusions section of its Report.

The field of comparative industrial relation studies is a relatively new branch of labour studies. Although the interest in such studies has grown quite rapidly in recent years, the approach to be taken and the methods to be applied are still very much subject of discussion. On one point though, there seems to be unanimity. As Professor Everett M. Kassalow pointed out in a recently published paper "The Comparative Labour Field" (Bulletin 5, November 1968, International Institute for Labour Studies, Geneva):

> A cardinal caution to be observed by students undertaking comparative cross-country studies is that they must be made from broad foundations of outlook.... The would-be comparative industrial relations student must of necessity be a one-man cross-discipline scholar. He must have a sense of history, politics, economics and sociology...must be almost an 'artist'...so heavy are the demands for 'intuitive perception' in this field which reaches across cultures.

During the preparation of this paper the author has become only too well aware of these demands. His indebtedness to published sources will be clear from the quotations and references in the paper. However, precisely because industrial relations are part and parcel of the overall political, economic and social scene of each country, they are constantly undergoing kaleidoscopic changes. This makes dependence on published sources very often a rather hazardous matter. To a considerable extent, therefore, the writer had also to depend on personal interviews with numerous representatives of government, management and labour as well as other experts in the field, and on documents and intra-institutional texts, news bulletins and organizational papers collected during a period of stay in Europe between 1957 and 1965 and specially undertaken visits in 1966 and 1968.

In the latter regard, the writer wishes to express his thanks to the officers of the Department of External Affairs and of the Canadian missions abroad, not least their Labour Councillors, all of whose unfailing willingness to be of assistance is greatly appreciated.

Equally a word of thanks is due to a large number of foreign missions in Ottawa, in particular those of Austria, Germany, The Netherlands, Norway, Sweden and Switzerland who went to a good deal of trouble in answering questions and in the procurement of literature.

The material contained in this study was originally submitted to the Task Force in several papers between September 1967 and October 1968. For the purpose of publication it was then agreed to integrate them into the present form. This also provided the opportunity to update and complement some of the material in certain fields.

In the preparation for publication, the writer owes much to Professor John Crispo whose criticisms and suggestions have been throughout an invaluable source of encouragement. In that regard, as well in regard to the author's position as a member of the staff of the Economic Council of Canada, it will be obvious that the opinions expressed in the following pages are entirely his own as is also the responsibility for any sins of omission and commission undoubtedly committed in a study of this kind.

Ottawa, May 1969.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

The Question of Relevance

One of the more obvious difficulties in assessing the relevance of experiences in industrial relations of some countries to others lies in the fact that industrial relations systems are so closely woven into the total economic, social and political fabric of each individual country; so greatly does their performance relate to the climate prevailing in each of these areas at any given time that they can be fully appreciated only in that overall context.

The question may well be asked, then, what relevance there may be in foreign, and in particular European, experience to our Canadian industrial relations problems. This question is the more justified because even superficial observation will soon establish that the legal concepts, traditions and institutional arrangements which enter into the various industrial relations systems in Western and Northern Europe are so different from those prevailing in North America and even differ so greatly amongst themselves that we could well come to the conclusion that we are comparing the incomparable.

Apart from the desire to satisfy scholarly curiosity—which may or may not be a useful exercise—there are two possible answers to the question of relevance:

(i) one, of a more general nature, relates to all comparative studies, namely, that the comparison of apparently incomparable systems may help us to understand better the elements which enter into each of them and, therefore, also those we try to come to grips with in our own country; and

(ii) more specifically in the case of industrial relations systems, that all the countries of the industrialized West have accepted a certain basic set of economic and social goals, usually stated as a high and sustained rate of economic growth, full employment, reasonable price stability, a viable balance of payments and the sharing of all citizens in rising standards of living. Common economic and social goals will then present themselves as similar problems and needs and will find expression in certain basically similar trends.

Obviously, the achievement of these goals does not rest solely with management and labour, but we may well have to assume that a satisfactorily working industrial relations system is an important ingredient in their attainment.

That there should be certain similarities in the approaches to industrial relations problems within the confines of Western and Northern European countries, despite their many divergencies, is not surprising. After all, and sometimes contrary to appearances, these societies have developed from common roots. The great social and political movements of the centuries, from whatever country they emanated, involved all of them, even if at varying degrees of intensity.

Despite the rise of the nation-state, the desire to re-unify the continent—either by force or consent—never fully disappeared. In our own time, basically similar goals and social values, but also the practical needs arising from an increasing interdependency furthered by common institutions,

could then also find expression in a remarkable document, the European Social Charter 1/, by which the contracting governments agreed on the principles that were to guide their policies and legislative activities also in the field of industrial relations.

On the other hand, our North American societies, despite similar economic and social goals, have developed sufficiently distinct characteristics that may give any dissertation on European experiences a certain aura of surreality and impracticability. We can never assume that laws and institutions, methods and techniques in industrial relations, which may seem to work well in the setting of this or that European country and may be attractive because of their idea content, may work equally well here. For us, therefore, the question of relevance cannot exhaust itself in an inquiry as to their transferability, but must rest with the recognition of what common needs they try to fulfil. It would certainly be a grave mistake to confuse relevance of experience with transferability of individual laws, institutions, methods and techniques.

The Emergence of European Post-War Industrial Relations Systems

Looking at the European industrial relations scene of today, what impresses the North American observer quite naturally is the low incidence of open conflict in almost all the countries concerned. In fact, most of them (France and Italy being significant exceptions) have experienced long periods of industrial peace ever since World War II, and this in striking contrast to their turbulent and even violent labour history of earlier decades. However, the significance of this fact should not be over-estimated nor should its continuation be taken for granted. We know far too little about the causes of industrial conflict or of its absence to be tempted into simplistic

conclusions. The industrial relations history of the countries with the highest incidence of conflict since World War II (France and Italy in particular) as well as those with the lowest (such as Germany for example) would indicate that the absence or presence of conflict may be due to factors and motivations that are not directly traceable to specific industrial relations systems or even have their prime cause in the employer-employee relationship. Indeed, the European labour scene since World War II may well give food for thought as to whether there is any correlation at all between a particular type of industrial relations systems and the incidence of industrial warfare.

The second observation to be made at the outset refers to the fundamental challenge to all Western industrial societies of how to achieve the above-enumerated goals simultaneously and consistently.

What may once again strike the North American observer is the degree to which considerations of those broader economic and social issues have apparently entered into the industrial relations process of the majority of European countries, and the extent to which collective bargaining is now taking place under the umbrella of economic and social policies, in the determination of which the parties on the labour market, in most instances, actively participate. A host of institutions, private and public, bi-partite and tri-partite, involving government directly or indirectly, have sprung up or were revived during the post-war period in many of the European countries to serve this very purpose. It would go far beyond the purpose of this paper to describe these institutions in detail although they are certainly worthy of study. However, their pervasive influence on the industrial relations process, including collective bargaining, can hardly be denied.

But lest there be any misunderstanding: a consensus on a given set of economic and social goals, which is at the root of these institutions, does not lead automatically also to a consensus on the policies by which they are to be achieved, or what emphasis individual goals may have to be given at any particular time, or by which methods some of their inherent contradictions may be overcome. The conflicts of interests remain, not the least important of which is the conflict of interest between management and labour. Despite the relative absence of open industrial warfare in most European countries over prolonged periods, industrial relations have not become a "love-in". What is implied here is that industrial relations have been institutionalized in a number of countries in such a way that the accommodation can take place from mutually agreed upon positions.

Given the turbulent and even violent industrial scene preceding and following World War I, and the contrasting development in most European countries following World War II, the question becomes pertinent as to how this change has come about.

There are no facile explanations. Nevertheless, we may be permitted to see in this change the impact of events roughly dating from the Great Depression to World War II and beyond that into the period of post-war reconstruction.

Following World War I the European economic scene was characterized in almost all countries by periodic mass unemployment. At the same time the ideological gulf that divided labour and management was one of two orthodoxies: Marxist socialism and economic liberalism. Neither proved capable of dealing with the problem of mass unemployment. Marxist socialism, dominant also in the democratic-socialist wing of the labour movement, was caught

in the dilemma between, on the one hand, an economic determinism which expected the breakdown of the free enterprise system as inevitable and desirable and, on the other, the need to come to its rescue by mitigating the sufferings of labour caused by mass unemployment. Economic liberalism, in turn, trusted in the automatic process of the market and thus only reluctantly tolerated and, therefore, limited, the intervention of the state in solving the unemployment problem. The result was a defeatism in both camps which, in the end, destroyed the democratic institutions and provided the fertile ground for the wave of totalitarianism that swept across the continent like a tidal wave during the thirties. Only a few of the smaller, older and more stable democracies survived, although even they were seriously threatened internally and externally.

It was in one of these countries, Sweden, that a labour movement began seriously to question the realism of that kind of economic thought that had brought about the dilemma between theory and practice which had confronted so many other labour movements at that time. By a fortuitous coincidence of circumstances, its party came to power in 1932 on the basis of having presented already in 1930:

> (Translation)
> ...an employment programme, which Keynes in fully elaborated form proposed only in 1936 and that world opinion began to embrace only at the end of the Second World War; an employment theory which today is accepted to such a degree, that all ideas still dominating in 1930, are now considered as basically wrong. 2/

The real point is not so much this anticipation of a new economic theory, as remarkable as it was, but that it could be put to a successful test. This had a profound effect on Swedish labour-management relations. One of its consequences was the famous "Basic Agreement" between the Swedish employers' and trade union organizations concluded in 1938. To be sure, it was not quite

the voluntary act of foresight that it sometimes has been made out to be. Government pressure on management and labour to end an industrial warfare which greatly endangered its economic programme, as well as the shadow of the coming war, had a great deal to do with bringing the parties to the negotiating table. Nor was its future role as the foundation stone of the Swedish industrial relations system foreseen. Even after several years a most knowledgeable observer could still speak of this Agreement as merely "a new wrinkle in Swedish negotiation machinery and procedures" and doubt whether it would constitute an important permanent addition to collective bargaining. 3/ Be that as it may, Sweden became (admittedly under highly favourable conditions) that laboratory of social experimentation which since has found world-wide recognition 4/ and sometimes rather hapless imitation.

It is, perhaps, not quite easy today to appreciate fully the revolutionary impact of the "new economics", especially when it is found more wanting under conditions of economic boom than of economic depression. It has to be seen within the context of the times. Here then, for the first time since the industrial revolution, was a practical instrument of economic policy to deal with the scourge of modern society (mass unemployment) that hitherto had been taken as inevitable, as was in previous centuries the "black death"; and without destroying the democratic process but giving it new life and meaning. Henceforth, full employment policies became a demand to which government as well as private parties were inevitably subjected.

Not less important for the new direction which industrial relations in Europe took, was the war experience. In the mind of the generation involved, the Second World War remained inextricably linked to the Great Depression, to mass unemployment and to its political consequences. Against this immediate

background of material and human destruction, the old antagonism appeared paltry and picayune. In countries overrun by the German war machines, old political and social antagonists found themselves facing the same enemy in the resistance movement, threatened by the same tortures, the same execution squads, the same concentration camps or sharing the same fate of exile. In fact, in a number of countries the ground for a new approach to the industrial relationship was laid within the resistance movement. This is particularly true of the Netherlands and Belgium and similar, but less lasting attempts were made in France, as shown by her early post-war labour legislation.

If the war experience sooner or later had to lose much of its motivating force, this was largely replaced by the needs of post-war reconstruction.

The repair of war-shattered economies and of physical destruction became overriding considerations in the liberated as well as defeated countries. The fear of a post-war depression similar to that following the First World War was general but anything less than full employment had become unthinkable. When United States aid was offered and accepted through the Marshal Plan, it required nolens volens economic planning of one kind or another. The European Coal and Steel Community, the Common Market (consciously conceived as the economic basis for overcoming the old divisions between nation-states), the European Free Trade Area and other international institutions, all this and more, established commitments which for their fulfilment not only depended on governments but were possible only if a consensus could be reached between governments and the organized interest groups at least as to the basic policies involved.

All in all, the social, economic and political scene in most of Western and Northern Europe as it emerged from the Second World War developed strikingly different from that following the First World War. Only in France and Italy do industrial relations, despite occasional legislative efforts, appear as cases of arrested development and whether the events of 1968 will bring about a lasting change still remains to be seen.

Nevertheless, the economic picture has been the same for all of Western and Northern Europe: there was no post-war depression, rather a reconstruction boom. Unemployment practically everywhere gave way to full, at times even overfull, employment. The recessions that occurred were short and shallow. Growth rates were achieved which overshadowed those of North America. The rise in real wages and incomes and the expansion of social security provided standards of living for broad masses of people never known before. For almost a quarter of a century now, Western and Northern Europe has experienced a period of prosperity unprecedented in degree and duration.

However, prosperity has its own set of problems:

> To a very large extent, it reflects the high all-round standards of performance which people nowadays quite rightly demand from their national economies. In a world of 'rising expectations' and of improved techniques of economic management, the tendency is to entertain not one but several major economic and social goals, and to set each of them at a level which more often than not implies a distinct improvement over average past performance.

At the same time:

> ...if economic goals can be mutually reinforcing in some ways, they can also come into conflict with each other, particularly in the short run. The most pervasive and recurrent goal-conflict of modern industrial economies has proved to be that between full employment and reasonable stability of prices (the latter being in most cases closely related to the objective of maintaining a viable balance of payments). 5/

It is against the background of these problems, which have been the main preoccupation of governments, management and labour throughout the post-war period, rather than those of the more traditional industrial relations issues, that the emergence of the present-day industrial relations systems in the large majority of European countries will have to be seen; although it would be a gross misreading of events to pretend that even all of the latter have magically disappeared, or may not reassert themselves again.

All in all, the social, economic and political scene in most of Western and Northern Europe as it emerged from the Second World War developed strikingly different from that following the First World War. Only in France and Italy do industrial relations, despite occasional legislative efforts, appear as cases of arrested development and whether the events of 1968 will bring about a lasting change still remains to be seen.

Nevertheless, the economic picture has been the same for all of Western and Northern Europe: there was no post-war depression, rather a reconstruction boom. Unemployment practically everywhere gave way to full, at times even overfull, employment. The recessions that occurred were short and shallow. Growth rates were achieved which overshadowed those of North America. The rise in real wages and incomes and the expansion of social security provided standards of living for broad masses of people never known before. For almost a quarter of a century now, Western and Northern Europe has experienced a period of prosperity unprecedented in degree and duration.

However, prosperity has its own set of problems:

> To a very large extent, it reflects the high all-round standards of performance which people nowadays quite rightly demand from their national economies. In a world of 'rising expectations' and of improved techniques of economic management, the tendency is to entertain not one but several major economic and social goals, and to set each of them at a level which more often than not implies a distinct improvement over average past performance.

At the same time:

> ...if economic goals can be mutually reinforcing in some ways, they can also come into conflict with each other, particularly in the short run. The most pervasive and recurrent goal-conflict of modern industrial economies has proved to be that between full employment and reasonable stability of prices (the latter being in most cases closely related to the objective of maintaining a viable balance of payments). 5/

It is against the background of these problems, which have been the main preoccupation of governments, management and labour throughout the post-war period, rather than those of the more traditional industrial relations issues, that the emergence of the present-day industrial relations systems in the large majority of European countries will have to be seen; although it would be a gross misreading of events to pretend that even all of the latter have magically disappeared, or may not reassert themselves again.

NOTES AND REFERENCES

1/ The European Social Charter was adopted by the Council of Europe at its meeting in Turin, Italy, on October 18, 1961 and, after ratification by member governments, entered into force on February 26, 1965.

2/ Leif Levin, "Planhushållnings Debatten", Almquist & Wicksell, Stockholm, 1967, pp. 64-65.

3/ Paul H. Norgren, The Swedish Collective Bargaining System, Harvard University Press, 1941, pp. 313-14.

4/ It is less well known that an Agreement similar in intent and circumstances was concluded one year earlier for the Swiss Engineering and Metalworking Industries under the name of "Peace Agreement". See "Swiss Pioneers of Economics and Technology" Nr. 2, published by the Association for Historical Research in Economics (Verein fuer wirtschaftshistorische Studien) Zurich, 1967. Also, this Agreement was concluded under the threat of legislative intervention to which both parties on the labour market were strongly opposed.

5/ Economic Council of Canada, Third Annual Review: Prices, Productivity and Employment, 1966, pp. 34-35.

CHAPTER II

THE INSTITUTIONAL FRAMEWORK

Relations Concepts and the Law

As all industrial relations systems have to operate within the framework of certain legal concepts, on the following pages frequent references will be found to the labour laws of various countries. All legislation being the result of political action and the expression of the prevailing political will, it is obvious that over time the changes in labour laws will reflect the changes in social morality and, above all, the changing concepts of the role of government as the guardian of what, at any given moment, is being regarded or presented as the public interest:

> (Translation)
> Certainly all branches of law are sensitive to important economic and social transformation bearing the imprint of contemporary civilization; but it is labour law, the law of d'avant garde which is the least conservative by its very nature and where changes manifest themselves most intensively and most rapidly. 1/

One does not necessarily have to share this rather sanguine view of labour law as the law of d'avant garde to see in it both a mirror and instrument of social change. Certainly one will find on the statute books and in the jurisprudence of practically every country, numerous instances where the reality of industrial life has either bypassed or surpassed the expectations of

the legislator or where they have remained unfulfilled. 2/ In fact, just the comparative study of industrial relations systems tends to confirm the warning (all too often not heeded) that it will never do to confuse a given body of statutes which contains public policy with the industrial relations system itself. 3/

It is, indeed, in the interplay and interaction of economic and social change with the law that the most significant trends in the development of industrial relations systems may be distinguished.

In that respect, three broadly conceived phases may be observed within the European context. The first was when the role of the state and consequently of the law was seen primarily as the guardian of life and property and the guarantor of the free play of market forces. (Needless to say, this in itself was a reaction to the stifling hand of the state and is a minute regulation of the economic life in previous periods.) A second phase was entered when the ensuing evils and social discontent began to force on government the role of the protector of the weak against the strong. And finally, the third and present phase when the role of the state is being seen as that of a positive agent of social progress; i.e., to enable larger and larger population groups to share in the growing material and cultural wealth of the nation, a growth process to which government itself is committed to contribute by specific economic policies.

In Europe the first phase was dominated, above all, by what we today would call the civil rights struggle: freedom of belief, freedom of assembly, universal suffrage and freedom of association. It is noteworthy that these aims were not fully obtained before the end of World War I, only to be put in jeopardy again by the rise of totalitarian regimes. The second

phase, partly overlapping in time with the first, brought the development of labour protective laws (labour standards), the beginnings of social security measures and the laws governing collective action. It is in the third phase, then, when new concepts begin to take shape: to the full employment goal corresponds the concept of a right to employment, embedded in some European constitutions as a new civil right; and besides, from the idea of the state as a positive social agent stems the concept of the social responsibility of the enterprise and with it the right of the labour force collectively, as well as individually, to participate in the decisions by which it is directly or even indirectly affected.

The Freedom to Associate and Act Collectively

Given the intimate link between freedom of association and political rights in the continental mind and given the long civil rights struggle which has left an indelible mark on the continental labour movement, one may appreciate the insistence of labour on anchoring the principle of freedom of association in national as well as international law, not only as a general principle of civil rights, but as a principle specifically applicable to labour's aims. Hence, the enshrinement of freedom of association in the Conventions of the International Labour Organization (ILO) and the obligations placed on the signatory powers to the European Social Charter to

> ...pursue by all appropriate means, national and inter-national... the right to freedom of association of all workers...for the protection of their economic and social interests. 4/

Freedom of association for the pursuit of economic and social interests has thus entered in a number of European countries into basic law in the form of specific constitutional guarantees or has become the subject of special legislation emanating from the civil liberties provisions of basic law. The

right to collective action is then frequently regarded as but a direct emanation of the freedom of association.

It will be noted here that freedom of association thus defined is conceived as a universal right of employees regardless whether public or private and regardless of function and status. This, in turn, means that there are practically no exceptions to this rule (in Sweden and Germany, for example, even military personnel may be unionized), and rules which would prevent managerial and so-called confidential personnel from organizing themselves in pursuit of economic interests are generally absent.

In a number of countries one of the consequences has been the growth of not only white collar workers' organizations, many of which go back over several decades, but also of managerial, semi-managerial and professional personnel. Their structural relationship to the main stream of the union movement varies greatly from country to country and even within countries. Similarly, the question as to whether supervisory personnel may or may not belong to the same union as those they supervise is not always clearly answered. In Sweden, in any case, where the unionization of all categories of employees has perhaps reached the highest degree, the Act governing the right of association and collective bargaining stipulates that the employer can demand, by contract, that his supervisory personnel may not belong to the same union as the employees whom they confront as management representatives. However, the employer cannot prevent the unionization and collective action of managerial personnel as such. 5/

If, thus, the universal right of association has become one of the basic tenets of most European labour law, the question of its possible infringement on personal freedom, i.e., the right not to belong to an association or a

specific association has found diverse and nuanced interpretations as to whether or not an employee in addition to claiming protection against an employer's infringement on his right to join a union, should also be protected against a union making employment dependent on union membership, or membership in a particular union, or alternatively prevent a person from obtaining employment by refusing membership. Obviously what is involved here are union security clauses in collective agreements, such as the closed shop, the union shop and the compulsory check-off.

It lies in the nature of things that the motivations behind the raising of a civil liberties issue in this context may be just as much a matter of sincere concern for individual rights as of plain anti-union bias, or bias against a specific kind or organization. This latter was quite clearly the case in the passing of the so-called Anti-Terror Act, i.e., "anti-union terror" by the Austrian Parliament in 1930, during the period of what used to be called "creeping fascism". It was plainly directed against the unions associated with the Austrian Social-Democratic Party in favour of the minority confessional unions associated with the government party. Despite these antecedents, the Act seems to have remained on the statute books, amended however in 1954 to permit the check-off. Since the post-war merger of the Austrian trade union movement, the Act has no longer any other practical importance.

The Netherlands Collective Agreement Act of 1927 forbids any agreement that would bind an employer to the employment of members of a specific church, political party or other organization. Here the law addresses itself to a particular type of organizational multiplicity both on the employer and trade union side.

The attitude in France has been wavering. The original draft of the post-war constitution contained a provision according to which "...everyone may belong to the union of his choice or not belong to any union at all". The final text only read that "no one may suffer in his employment by reasons of his antecedents and beliefs", but then the Collective Agreement Act of 1950 was amended in 1956 to read that "no employer shall take into account trade union membership or the pursuit of trade union activities" in reaching decisions in matters of recruitment, etc. The Act furthermore expressly forbade the check-off. It may be going too far to attribute the excessive weakness of the French trade union movement to these legislative provisions (in fact it may be the other way around) but it certainly was not very helpful in promoting union organization. Whether or not the negotiations on trade union rights following the events of May 1968 will bring a change still remains to be seen.

In Germany it has become somewhat of a lawyers' dispute whether the Bonn constitutional guarantees of civil liberties make union security clauses in collective agreements illegal. There appears to be, however, a consensus that the constitutional provisions which forbid associations aiming at the subversion of the constitutional order, by implication also forbids any collective action to prevent a person from obtaining or maintaining employment because of non-union membership.

The Scandinavian countries, on the other hand, have no legislative provisions that are directed against union security clauses. Sweden very definitely refuses protection to the unorganized. In Denmark the matter rests on a decision of the Labour Court of 1911, according to which the unions renounced the right of exclusive employment of union members by the "September

Agreement" of 1898, which has remained the basic law of that country's relations system. However, this Agreement only covered the member firms of the contracting employers' association. In a similar but less formal agreement, the Swedish union renounced this right in a 1908 Agreement as a quid pro quo for non-interference by the employers in union organizing.

Kahn-Freund 6/ holds that on the European continent union security clauses in collective agreements are frowned upon by law. Notwithstanding this, there are a number of European countries which have no legal provisions covering this subject. However, he also agrees that the important thing is not so much the law but its practical significance, and that the prevalence or absence of union security arrangements cannot be measured by legal rules. The fact is that European unions, for one reason or another, have traditionally never attached quite the same importance to union security as do their North American counterparts, at least in the sense of agreements with employers for 100 per cent coverage, and this despite the fact—as we will see later—that there are in general no legal provisions concerning union recognition, certification or majority representation. Contributory factors to this may well have been the early decline of craft unions, an overall emphasis on voluntaryism as a reaction to the compulsory "trade unionism" of the totalitarian regimes of the Right and the Left, but also the prevailing industrial union structure which contributes to inter-union "open door" agreements or by-laws. In matters of entry into unions and inter-union membership transfer, European unions have traditionally been rather liberal in outlook. The Swedish Trade Union Federation (LO) has embodied the "open door" principle in its by-laws and the Norwegian LO requires the same policy from its affiliates by convention decision.

Generally speaking, there seems to have been as yet no desire to make union security a major issue, though the impression may be gained that check-off or quasi-check-off arrangements are on the increase.

Union Structure

One of the very fundamental differences between our North American and the European industrial relations systems relates to those of organizational structure both on the labour as well as on the management side.

Within the European trade union movement industrial unionism became, from a relatively early stage in its organizational development, the prevailing pattern. A Swedish trade union leader, when asked for an explanation, gave as his opinion, that industrialization reached Sweden late and was a rather slow process. This, he meant, gave the opportunity to put it from its beginnings on a more rational basis. However, the organizational pattern has become very similar in most European countries. A good deal more historical and comparative research would be necessary to establish the contributing causes but some may be suggested. For various reasons craft unions declined very early as a major influence. In most countries of Europe the industrialization process started at a stage of technology which already required the massive entry of semi and unskilled labour so that the widely scattered and relatively weak craft unions and associations had little time to become major power centres. Moreover, craftsmanship had largely centred on the independent artisan with centuries of proud traditions. Industrialization meant the loss of a cherished independence and the loss of these traditions, creating a deep resentment and hostility to capitalism. It is symptomatic that among the names of the pioneers of the European labour movement are often to be found those of master craftsmen.

In a number of countries the early craft unions or associations were politically aligned to "bourgeois" parties and became swamped by the growing power of the socialist-oriented mass unions. Social immobility and the lack of political rights helped to create a class consciousness which became a strong motivational force in creating a class solidarity that transcended particular trades and skills.

Moreover, about the turn of the century the various unions began to group themselves into national trade union centres in response to which management too began to organize. Industrial relations thus developed quite early the characteristically European pattern of an organization-to-organization relationship leading to a centralization process that encouraged the groupings of larger and larger units. From then onwards the number of unions affiliated to any particular union centre (always smaller than in Britain or North America) began to decline, leading to combinations of broad categories rather than individual trades and skills. And this consideration process is still going on although in most countries it has been rather slow and often painful. All institutions tend towards self-perpetuation and, in particular, the trade union movement by its very nature and purpose develops strong organizational as well as personal loyalties. Trade unions, wherever they are, do not lend themselves easily to theoretical organization schemes, however rational and desirable they may appear. The Swedish trade union movement, for example, already accepted in 1912 an organizational plan to reduce to 22 the number of unions affiliated to the LO. Despite repeated confirmation of this plan (most recently at their 1966 convention) it is still far from complete implementation. Only in Germany and Austria has the radical reduction to 16 industrial unions been achieved at one stroke, but this only after the brutal interruption of organizational life for more than a decade. It is perhaps

not without interest to note that during the early reconstruction period in both countries, British and United States trade union assistance was at work and not only provided encouragement to submerge the old politico-ideological differences in unified trade union centres, but also to rebuild the movement on the basis of this small number of broad industrial groupings. Upon an inquiry as to their motive, the characteristic answer was received that "this they would do, if they too could start afresh".

Union Multiplicity, Union Rivalry and the Jurisdictional Conflict

In this context reference may also be made to a phenomenon which, while playing a rather important role in the North American relations systems, appears to be only a subordinate concern in Europe: the jurisdictional conflict.

To the North American observer, the relative absence of jurisdictional conflict from the European industrial relations scene may appear the more puzzling as the predominance of industrial unionism has by no means prevented union multiplicity. However, it has to be noted that union multiplicity in Europe has taken on a quite distinct character: the divisions occur either on politico-ideological lines (democratic-socialist, confessional, communist), or follow broad socio-economic groupings (industrial workers, salaried employees, semi-managerial, managerial and professional personnel), and on occasion as a combination of both. Examples of the first type are to be found particularly in the Netherlands, Belgium, France and Italy, and of the second type in Sweden where the blue collar workers' unions are closely associated with the social-democratic party while salaried employees and professional workers' unions tend towards a political neutrality and, to a minor degree, in Germany.

Curiously enough, politico-ideological divisions lead to much less organizational rivalry than could be expected, possibly because of the a priori established loyalties. Moreover, very practical considerations may prevail sometimes in reducing open conflict between ideologically divided union bodies as their strength may be greater in one area than another or among certain workers' categories than in others. Thus, the growth of the Christian unions in Belgium since the end of World War II can well be ascribed to the growth of industry in the Flemish districts as well as their attraction for the more conservative elements among white collar employees rather than to any effort to take membership away from the socialist-oriented unions. Conversely, the relative but not absolute decline of the latter unions may essentially be due to the shrinking importance of industrial labour as a part of the total labour force, as well as to the economic decline of the Walloon districts.

In recent years the old ideological distinctions have become increasingly blurred as far as day-to-day union practice and relations are concerned. The union mergers of confessional and social-democratic elements in Germany and Austria were completely successful and remained unaffected by any changes at the political level. But even in the Netherlands and Belgium, where expectations of mergers remained unfulfilled, one would be hard put to find very strong differences in trade union action between the various bodies. Moreover, in Italy the Christian-Democratic Confederazione Italiana dei Sindacati dei Laboratori (Italian Confederation of Labour Unions) (CISL) refused from the outset to adopt a confessional outlook while the large majority of Christian unions in France in recent years dropped the confessional connotation. Even where, as in Italy and France, the majority segments of the union movement remain (nominally at least) communist-controlled, this same blurring

of division lines can be observed. In some respects, also, the emergence of joint institutions such as the Economic and Social Councils in the Netherlands and France, and the Labour Council and Mixed Commissions in Belgium, very often tends to force, even upon ideologically divided unions, a certain amount of active co-operation in confronting the management side or government policies. In addition, the upwards shift in the locus of decision making, characteristic of the centralization process, facilitates the establishment of internal machinery for solving intra-union disputes without their having to enter into the bargaining process. Hitherto such machinery appears to have been sufficiently effective to overcome organizational problems arising from technological change. In Sweden and in Germany, for example, the industrial groupings have been sufficiently broad that such problems remained marginal. The question of the union allegiance of workers assembling prefabricated units on location was reported in Sweden to have been solved by a transfer of these workers to the Construction Workers' Union. In Germany, certain difficulties arose between the Chemical Workers' Union and the Construction and Building Materials Union, as well as between the Chemical and Textile Workers, but none of these had hitherto serious consequences.

In the case of socio-economic divisions, the jurisdictional conflict can still be of some importance especially when the distinction between industrial workers and white collar employees becomes blurred or where the position of supervisory personnel is difficult to define, viz. the recent disaffiliation in Sweden of the Foremen's Union from the Central Organization of Salaried Employees (TCO).

On the basis of our own Canadian experience we often tend to equate union rivalry with jurisdictional conflict pure and simple. However, this is not the only way in which union rivalry may express itself. Evidence is now

accumulating, particularly in Sweden, that the classical conflict over representation may either be absent or lessen, only to be replaced by conflicts and tensions arising from the rivalry over "the share of the economic cake". While some unions, especially the industrial workers' unions, may strive to narrow income differentials, others, such as those of salaried employees and professional workers, may tend to maintain or even try to widen them. This seems to have been the main reason that in Sweden efforts to establish joint bargaining of all groups for the 1969 negotiation round have come to naught. Centralized bargaining may not be the cause but tends to bring wage rivalries more clearly into the open. 7/

Management Organization

As already remarked, the emergence of strong and well organized management organizations is one of the most marked characteristics of the European industrial relations scene. It is usually maintained that employer associations were formed in response to the growing power of the unions and to the depository of much of this power in national trade union centres. This may be true in that the practically simultaneous formation of national trade union centres and employer associations can hardly have been pure coincidence. However, the centuries old tradition towards economic organizations of interest groups cannot be overlooked. The speed with which these management organizations were formed and the power positions which they assumed, not only vis-à-vis labour but over their own membership, could well be linked to the fact that co-operation rather than competition, even supression of competition, has for long been a pronounced feature of much of European economic life leading on the one side to the unhindered formation of trusts and combines and on the other to protective measures favouring the small

entrepreneur. It is only relatively recently that European governments have shown a greater interest in competition policies.

Much more research into the history of European management organizations would be necessary to explain them as a phenomenon of the continental industrial relations scene. It is most likely true that in their creation and the development of their industrial relations policies, larger-scale enterprise played a dominant role. This view was forwarded by Sweden's most prominent industrial relations expert, Professor Folke Schmidt. However, corresponding to the structure of much of European enterprise, while a relatively small number of firms may employ a disproportionately large number of workers, the overwhelming majority of membership firms consists of medium-sized and even small employers who may well find in the management organization the best protection against the massed power of large industrial unions not only in negotiations but also by insurance against financial loss in the case of open conflicts. In addition, management organizations have developed more and more ancillary services—industrial relations and personnel administration research, information and publication, counselling, management education—which are of great value especially to the medium- and small-sized enterprises.

In structure, management organizations on the European continent tend to closely parallel that of the unions whereby the whole is obviously related to the structure of industry itself. Centralization of power at the one side is then also reflected on the other. In fact, in certain instances—the Svenska Arbetsgivareföreningen (Swedish Employers' Federation) (SAF) is one example—the powers to commit the membership are sometimes even greater on the employers' side than that of the unions. For obvious reasons, ideological differences leading to organizational divisions are rarely reflected

on the management side, which for example in France, gives management organizations a much greater cohesion and power than prevails on the union side. The Netherlands presents an interesting case to the contrary. Here, the division of the labour movement into confessionally neutral and confessionally oriented unions has its equivalent on the employers' side, both related to the prevailing political party structure.

Concerning the employers' freedom of association, the rule appears to apply that such associations enjoy the same rights and are under the same obligations as the unions. Where legislation governs the status and activities of both, there is usually a conscious effort to establish equality in law.

No generalizing statements are possible concerning management approaches and practices in the various countries. There is a world of difference between the policies of the Swedish Employers' Federation and the French "patronate".

In any case, whatever the causes that gave rise to management organization, the effect has been that henceforth the industrial relations systems developed as a relationship between organized forces—a power relationship complemented by strongly organized political power to which the plant level relationship is clearly subordinate.

Economic Interest Organizations and Political Action

The close association of economic interest organizations with political parties has always been openly acknowledged in Europe and accepted as a fact of political life ever since parliamentary government came into being.

Unlike on this continent where the historical parties tended to become rather broad and loosely organized coalitions containing often contradictory regional and social elements and consequently shifting allegiances, the European party system has tended towards a far more faithful reflection of the class structure in society and to strongly pronounced ideological divisions.

The close relationship between trade unions and political parties in all European countries is well known. The emphasis of the labour movement on political power was, however, not only a matter of ideology. The civil rights struggle in societies of sharp class divisions and social immobility was not an end in itself; it was based as well on the need to compensate for as yet weak economic power by political power, the latter for long outweighing the former. Socialist parties based primarily on the growing multitude of industrial labour became the chief vehicle. In some countries the emergence of confessionally oriented unions established similar links with confessionally oriented political parties, largely of lower middle-class origin.

In the early stages, when the civil rights and economic struggle were still deeply intermeshed, there was little difference between unions and party organizations. Moreover, the syndicalist concept of direct economic action for social change without entering into the political power structure was still very much alive. Traces of this can still be found in the Latin countries, and syndicalist organizations survived even in Sweden and Norway into the recent past. However, in most countries the functional separation of the trade union movement from the political labour movement became clearly established about the turn of the century. Separate national trade unions centres began to emerge and two institutional systems developed: collective affiliation of trade unions to the political party, and individual membership in both although retaining a common ideological base. Sweden and Norway

still have collective affiliation of unions but only at the local level with "opting-out" provisions. In Belgium, collective affiliation of the socialist-oriented unions to the Belgian Labour Party survived until the end of World War II when it was abolished in the hope of a merger between the socialist and confessional unions. But also in Sweden and Norway the importance of collective affiliation in relation to membership seems on the decline.

In all other countries the pattern of individual membership prevailed and links to political parties are in principle ideological and personal. As far as could be ascertained, only Denmark has statutory provisions for mutual representation in the executive bodies of the trade unions and the social-democratic party. Whatever the structural relationship in all European countries trade unions are quite strongly represented in the governing bodies of political parties and in the legislative bodies. In theory this is a matter of personal choice. In practice, however, there is a mutual interest for the parties to assure themselves of a political power base in the unions, and on the unions' side to exert a direct influence on the legislatures.

However, the shouldering of governmental responsibilities, the relative decline of industrial labour within the labour force as a recruitment base and the lessening of the bond of "class consciousness" with rising standards of living and greater social mobility, have all served to put the two arms of the labour movement, if not in opposition, into apposition to each other. There has been a growing emphasis on trade union independence and it is perhaps significant that the designation "free" trade unions which originated in Germany and originally marked the distinction between socialist and confessionally bound unions has been extended since the Second World War to all unions which proclaim independence from government, employers and political parties. 8/ It further serves to underline the difference between the

communist-led unions and the free trade unions, in that the former are regarded by their opponents as dominated by the party leadership and accused of solely serving party interests. 9/

Nevertheless, even today it would be completely unrealistic to see the European industrial relations scene isolated from the role of labour and management in the political power structure. The organizational discipline and internal cohesion which had developed over decades of struggle is undoubtedly one of the elements which constructively contributed to the post-war reorientation in industrial relations.

NOTES AND REFERENCES

1/ "Les Grandes Tendances du Droit du travail à l'Epoque Contemporaine", Avant-Propos par André Brun, Revue Internationale de Droit Comparé, Paris, janvier-mars 1967, p. 6.

2/ A.W.R. Carrothers, Collective Bargaining Law in Canada, Toronto, Butterworths, 1965, p. 6.

3/ H.D. Woods and Sylvia Ostry, Labour Policy and Labour Economics in Canada, Toronto, MacMillan, 1962, p. 3.

4/ The phrasing of this clause is very similar to that also found in individual country constitutions. Thus the German constitution speaks in Article 9 of freedom of association specifically as "safeguard and improve working and economic conditions".

5/ Folke Schmidt, "Kollektiv Arbetsrätt", P.A. Norstedt & Söner, Stockholm, 1967, p. 177.

6/ In "Labour Relations and the Law", a Comparative Study, edited and with an Introduction by Otto Kahn-Freund, Stevens and Sons, London, 1965, p. 9.

7/ The critical examination of the Swedish bargaining system following the 1966 negotiation round appeared initially to point towards even further centralization. However, the subsequent ever more strongly emerging tendency towards income comparisons between different wage and salary groups and consequent earning rivalries between industrial workers and white collar and professional workers characteristic of the 1969 negotiation round may well have squashed any further centralization attempts for the time being. A contributing factor to this may be that the organizational structure of the white collar and professional workers federations is a more loose one than that of the LO and, therefore, less able to enforce the latter's negotiation discipline amongst their affiliates.

8/ The designation "free" vs. "christian" unions survived at the international level in the names of the International Confederation of Free Trade Unions (ICFTU) and International Federation of Christian Trade Unions (IFCTU). However, at its recent Sixteenth Congress in Luxembourg, the IFCTU changed its name to World Confederation of Labour following a trend among its affiliates to drop the confessional connotation. Merger attempts between the two Internationals in the early 1950's failed allegedly because of the insistance of the Christian International to retain its identity within a merged world body. Nevertheless, co-operation has developed over the years between the two organizations in a number of areas and the possibility of closer association, appears more likely now than in the past.

9/ Significantly the Italian christian-democratic oriented CISL has recently introduced the principle of strict separation of trade union and political office.

CHAPTER III

THE COLLECTIVE BARGAINING PROCESS

Union Recognition and Bargaining Structure

There is no equivalent in European industrial relations systems to the certification procedure and the statutory bargaining unit.

The very general observation can be made that continental collective bargaining law in most instances is more concerned with establishing a general legal framework for the bargaining process rather than seeking to regulate the process itself. In comparative studies of labour law, attempts have sometimes been made to distinguish between countries whose legal systems are based upon the "common law" tradition and those of "civil law". However, these studies have also shown that the common features as well as the differences of the two law traditions can be very exaggerated in their practical effects on the bargaining process, though some authorities are inclined to discern what at first glance may appear rather paradoxical, namely, a greater inclination to legislative intervention in common than in civil law countries. 1/

It seems apparent in any case that in most continental countries of Europe legislation has, especially in later years, taken a back seat in the

development of industrial relations systems—labour standards and social legislation apart. There is still a rather pronounced tendency, although of varying strength, to keep government and the law at bay as much as possible. The "self-government of the labour market", as the Swedes call it, remains the ideal cherished both by management and labour.

As Kahn-Freund observes, there are no greater pitfalls for generalizations than in the areas of the "law of industrial peace and industrial warfare". Nevertheless, when it comes to the "agency" problem:

> ...for once, one may generalize about Europe because in all European countries a union "represents" only its members. On the other hand, the terms of a collective agreement are, by the employers who are bound to the agreement, generally applied to all employees, whether or not they belong to the contracting union. And this is so whether these conditions apply (as in France) automatically to all their employees or whether (as in the Netherlands) the employer is under an obligation so to apply them, or whether (as in Germany or in Great Britain) he does so without any legal compulsion and simply because any "discrimination" between organizations or between unorganized and organized labour is impracticable and likely to lead to that type of friction which most employers are desperately anxious to avoid. Hence the facts of industrial life, supported in some countries by the legal rules applicable to the effect of collective agreements, obviated the need for constructing a scheme of legal thought in which the unions appear as representatives "ex lege" of employees who are not linked with them through a contract or membership. This, however, was necessary in the United States, in view of the intense rivalry of unions...and in view of the absence of joint collective bargaining...or of a systematic structure of unions based upon the principles of industrial unionism.... The need for the "statutory bargaining representative" in the United States (note: in Canada as well) must be understood against the background of a society in which union practice is hardly influenced by the idea of working class solidarity and in which the intense competition between unions extends into the field of collective bargaining in a way unknown even in those countries (such as Belgium, France, Italy and the Netherlands) whose unions are divided by political and religious differences. In America the law had to create a union monopoly of representation in each bargaining unit. 2/

In a practical sense, the bargaining bodies are the outcome of a power struggle and more often than not a matter of established practice, traditions and mutual acceptance rather than that of a prescribed process. Once again,

it is important to note that the basic relationship in collective bargaining in Europe is not that between the individual employer and his work force, but the organization-to-organization relationship of organized management and labour to which the individual employer-employees relationship becomes largely subordinate.

In a way it could be said that the duty to bargain on the one side is derived from the right to bargain on the other, and that the employers are "free" to choose their bargaining partners. However, the "facts of industrial life" will impose upon them the duty to bargain with that organization that "can deliver the goods". Nevertheless the law can restrict this freedom by such notions as the "most representative organization" or, as in Germany, by defining what association of employees may be capable of concluding collective agreements. There, only an organization which is "voluntarily established and intended to be permanent...should not be subject to any form of influence by their oppositive numbers...must not be confined to a single firm (company union)...and shall be prepared if necessary to conduct an industrial dispute (strike or lockout)" is being regarded as having this capability. Thus, the bona fide union is effectively protected. If any dispute should arise as to whether in a specific case an association is qualified, the German Labour Court Act prescribes a special procedure under which the matter may be brought before the tribunal which gives a binding decision. 3/

An interesting example of the "agency" problem is provided by the controversy in France, following the May 1968 events, over the status of the local (plant) union. The French "patronate" recognizes five national union bodies, Confédération générale du travail (CGT), Confédération générale du travail-Force ouvrière (CGT-FO), Confédération française démocratique du travail (CFDT), Confédération française des travailleurs chrétiens (CFTC),

Confédération générale des cadres (CGC) and has concluded agreements with them but nevertheless kept them in many instances at arms length at the plant level. The May events clearly demonstrated the desperate weakness of the trade unions, not the least of the communist-led CGT, to control events at the plant just as it had been revealed under very similar circumstances during the Bloc Populaire regime more than three decades earlier. The central union organizations have now insisted not only on the right to establish union locals at the plant level, but also that this right should be restricted to their constituents while the employers insist that this right should also be extended to "independents". As it stands at the time of writing, it is most likely that this matter will have to be settled by legislation, whether or not the two parties will be able to agree on its contents or not.

In Sweden, as in Germany, "agency" problems may have to be solved by the Labour Court. The following is an example of how a problem arises when established practice is being challenged. Even before passing the new (1965) Collective Bargaining Act for State Employees, collective bargaining did in fact take place in the government services and the practice evolved that a certain limited number of "main-organizations" would represent the employees. This policy was confirmed following the passing of the new legislation. However, for some time an affiliate of one of these organizations has been involved in a long-standing jurisdictional dispute (Foremen's Union v. Central Organization of Salaried Employees) and the union notified its parent body of its intentions to disaffiliate. The question then arose whether under these circumstances the collective agreement concluded with the competent government agency was binding on that union. The decision went against the union, but only because at the time of the conclusion of the contract the Court deemed that the conditions of disaffiliation under the by-laws of the

parent organization had not yet been fulfilled. 4/ Two ways then remain open: either the employer (in that case the negotiations agency of the government) and the other organizations may agree to accept the union in question voluntarily as a bargaining partner, or, a new decision by the Labour Court may be sought.

There is, however, another aspect of union recognition that has developed through the emergence of public and semi-public bodies with interest group representation by government appointment. In countries with union multiplicity such recognition by government can be of some importance in giving national prominence to minority groups far beyond their membership strength. In France, where the unions have been playing a far greater role as pressure groups vis-à-vis the government than as bargaining partners of the employers, this tendency has been quite pronounced. The notion of the "most representative" organization imposes certain restrictions but governments have been rather generous in their interpretation and "representativeness" has been accorded more and more easily to union organizations. 5/

The Effects of Union Multiplicity on the Bargaining Process

The effects which union multiplicity may have on the bargaining process under conditions described above and in the absence of statutory bargaining units may best be illustrated by some examples without, however, exhausting the subject.

In the private sector in Sweden, three central bodies are involved: the Landsorganisationen i Sverige (Swedish Federation of Trade Unions (LO)) (mainly industrial, transport, wholesale and retail trade workers), the Tjänstemännens Centralorganisation (Central Organization of Salaried Employees (TCO))

(mainly clerical personnel), and Sveriges Akademikers Centralorganisation (Central Organization of Swedish Professional Workers (SACO)). As the centralized negotiation system has evolved over the last decade or so, the LO emerged as the "pattern setter." The same three organizations have also been involved in the negotiations in the public sector. Being the first in line in the "negotiation round" has not only produced serious tensions for the LO internally but it was noted above all that as the months of the round dragged on the apparent advantage accrued to those which entered it in the later phases. Following the 1966 negotiation round, which also for other reasons came near the brink of a massive open conflict, efforts were made both on the part of the employers and the LO to bring about joint and/or simultaneous bargaining of all groups for the 1968-69 negotiations. These efforts failed with the consequence that the LO threatened that it would not sign any agreement before the other organizations, even at the risk of open conflict.

On the other hand, the law may have to deal with the existence of certain minority groups which, for one reason or another, do not wish to belong to the main streams of the trade union movement. In Germany, the position of the Trade Union Federation (DGB) and its affiliates has become so overpowering in matters relating to collective bargaining that it amounts to a practical monopoly. However, to satisfy some splinter groups, there came into being the notion of "secondary agreements" which are nevertheless not concluded on the basis of separate negotiations but only give these groups the opportunity of separately signing identical agreements. Similarly, Sweden uses what is called a "hängavtal" (roughly translated: dependent agreement), the legal status of which has been the subject of several judicial decisions. This would be an agreement reached with or between

"unorganized collectives" which would then refer to the conditions laid down in the actual collective agreements. 6/

It is unlikely that either of these two types of secondary agreements have any major practical importance in the countries concerned except in defence of the principle of freedom of association.

In Italy union multiplicity is a much more serious matter. There are at least three politico-ideological groups involved: the Confederazione Generale Italiana del Lavoro (Italian General Confederation of Labour (CGIL)) (communist-socialist), the CISL (encompassing mainly christian-democratic elements although denying any confessional colouring) and Unione Italiana del Lavoro (Italian Union of Labour (UIL)) (social-democrat). Here the Constitution which replaced that of the "corporatist" state after the Second World War re-established the principle of the freedom of trade union organization, thus providing

> (Translation)
> ...the possibility of recognizing the legal existence of more than one organization (under the sole condition of respect for internal democracy); it does not confer binding and exclusive character on a collective agreement unless the conditions of "unitary representation" are met, namely that the unions involved must decide jointly and be represented proportionally to the number of their adherents. The collective agreement which fulfils these conditions does then become binding erga omnes.... 7/

In Switzerland 8/ the overwhelming majority is organized within the Swiss Trade Union Federation and the associated Federation of Salaried Employees Unions, representing together about 83 per cent of the organized labour force. Three other organizations (Christian, Evangelical and Independents) share most unevenly the remaining 17 per cent. Each organization has the right to enter into collective agreements. However, this has presented employers with a

problem especially as the strength of the various organizations tends to differ as to trade and regions. The problem has, therefore, found different solutions regionally and by trade. Either the employers' organization negotiates with several unions at the same time or it negotiates only with one, usually the biggest. In the latter case it enters into a collective agreement with that union while the other unions are often allowed to become parties later or themselves enter into mostly identical agreements. In some cases the employers' organization enters into a "principal agreement" with a union and this agreement lays down the circumstances in which "parallel agreements" may be entered into with other unions.

Complaints by the minority unions "to be bullied" have resulted in a number of legal provisions:

1. When several associations of employers or of employees are parties to a collective agreement they are each entitled to "the same rights and duties in proportion to those of the others", i.e., they are represented at the joint negotiation committees in proportion to their membership.

2. The legal duty to "honour agreements" may not be required of a member of an association which is not a party to the agreement if the association has not been permitted to enter into a similar agreement or to become a party to the agreement.

3. "Extension" may be ordered by the government only if the parties to the collective agreement agree to other organizations becoming parties with the same rights and duties, always subject to the condition that the organizations in question show that they have a valid interest and offer sufficient guarantees.

The Role of the Collective Agreement in Centralized Bargaining

On this continent, and particularly in Canada, when we speak of collective bargaining our mental picture is still that of bargaining between an individual employer and his work force represented by the union, rather than of multi-employer or multi-party bargaining which still remains the exception

rather than the rule. Although multi-party bargaining may have effects similar to centralized bargaining as it evolved on the European continent, and may even be a step in that direction, it cannot simply be equated with it. The difference appears to stem from the organization-to-organization relationship. This relationship commits the individual employer, through his organization, to the acceptance of a specific set of wages and working conditions and, through the automatic and/or legal extension effect, even employers and employees beyond the confines of the contracting parts. In most cases, the individual employer and his work force will enter the picture only in so far as it is found necessary to adjust the contractual wage rates and working conditions by non-contractual and quasi-contractual arrangements.

Undoubtedly the centralization process was greatly facilitated by the unitary character of almost all European countries with their concentration of powers in central governments and legislatures, and regional and local subdivisions having only limited authority. However, even in the three countries (Austria, Germany and Switzerland) with federal constitutions, the constitutional division of authority does not seem to present any major problem in industrial relations. The Austrian constitution explicitly reserves all labour legislation to the federal government, with the exception of agricultural and forestry labour. In Germany, jurisdiction in labour matters is divided between the federal and provincial (Laender) authorities but federal law is the primary source of labour law such as that emanating from the constitutional provisions concerning freedom of association and protection of civil rights, the federal jurisdiction over public corporations, and the numerous federal acts, such as the Co-determination and Works Constitution Acts, as well as the decisions and law interpretations of the Federal Labour and Social Courts. Although collective bargaining takes place in Germany

regionally, the bargaining regions do not necessarily coincide with the political border of the provinces. Even in Switzerland, with its strong emphasis on provincial (cantonal) autonomy, the main sources of labour law are to be found in the federal field, such as the Constitution and the civil "Code of Obligations". In both countries there are variations in the provincial (Laender and cantonal) labour laws which seems, however, to have no major importance in the overall picture. In none of the European federal countries does the constitutional division of powers result in a restriction on the federal authority to jurisdiction over a limited number of industries. The similarity is, therefore, rather with the United States than with Canada.

At first glance a centralized bargaining system seems to have considerable advantages over individual enterprise and plant bargaining.

First of all, it is partly the cause and partly the effect of a simpler and apparently more rational and orderly bargaining structure.

It tends to depersonalize the actual bargaining negotiations by removing from the bargaining table the idiosyncracies and irritations which often tend to develop within the narrow confines of the individual enterprise.

It may facilitate the entry of broader economic and social considerations related to commonly accepted goals into the bargaining process and tends to develop corps of professional negotiators and research personnel on both sides, (responsible to their organization, rather than individuals) who then develop certain standards of behaviour based upon the mutual respect, or at least the assumption of professional integrity. Admittedly this "professionalization" of the bargaining process has not always been regarded as an unmixed blessing, especially in the trade union movement, but it does appear to

lead to better mutual acceptance of researched facts whether they come from the one or the other side of the bargaining table.

However, centralized bargaining has also developed its own set of problems which relate both to the nature of the process itself as well as to its result, the collective agreement.

European collective agreements, having taken in the main the form of broad regulations setting standards for wide sections of the economy, have tended therefore towards being minimum agreements concerning wages and other benefits.

If it is to be the aim of centralized bargaining to bring about a more rational and less fragmentized wage structure, there appears to be little evidence that this has been achieved to any greater degree. Although the possibilities of measured comparison are extremely limited, the overall impression remains that wage determination under centralized bargaining is hardly less fragmentized than under our system of enterprise-by-enterprise bargaining and certainly not wrought with less uncertainties, possibly even more.

As to its effects on the total wage share, a Swedish trade union publication frankly admits:

> ...it is generally recognized that the size of the wage share is determined to a great extent by factors other than the wage policy, and the trend of real earnings less by the result of negotiation than by the tendency of prices and productivity. 9/

It is indeed

> ...a most intriguing and relevant phenomenon that in the long run the broad sharing-out of industrial income between wages and salaries on the one hand and profits on the other exhibits a fair degree

> of stability. This has been observed and commented upon in a large number of countries, including Canada. Over the course of the short-term business cycle, the struggle visibly ebbs and flows...; but over the longer run the great battle for income shares turns out to be much more of a saw-off than the tumult and the shouting might lead one to expect. 10/

However, if it is intriguing that the factor share of wages and salaries in the national income remains remarkably stable and similar in all industrialized countries, it is equally so that there is (as the Swedish economist Eric Flaxén has pointed out) 11/ "for the whole period 1958-1966...a remarkable parallelism in the wage development" of the Western and Northern European countries. Over this period the country deviations from the annual average European wage increases did not exceed more than one per cent. The country deviations were greater if measured over a shorter, such as a three- or five-year, period which leads Flaxén to remark that "a single country has apparently over a three- to five-year period a not inconsiderable margin of independent action in wage policy"; but in the long run there is a parallelism in wage developments between countries that largely share the same international markets, which seemingly comes about regardless of variations in industrial relations systems and methods of wage policy.

Under these circumstances, trade union wage policy tends to protect the wage and salary earners against the short-term fluctuations in the wage and salary share in the national income, and with increasing production and productivity, secures their participation in rising incomes and standards of living in that

> ...it has been shown by experience that if increased production takes place without any alteration in pay, the required price reduction very seldom follows, and, therefore real wages do not rise: in other words the workers, relative share of the national income sinks. Mistrust of the price fixing adopted by individual enterprises, and of the mechanism of price formation in general, is so

great that labour generally regards the yearly pay increases as the surest, if not the most satisfactory means of achieving the wage share in the economy aimed at. 12/

In Sweden the so-called "wage drift" has in recent years amounted to about half the total annual wage increases. It should be noted here that in this as well as in most other European countries piece rates or, as it is sometimes called, "pay by performance", are still prevalent in many sectors of industry and unlikely to disappear soon. 13/ Usually the piece-rate system is held at least in part responsible for the wage drift phenomenon. However, other employee groups, even those on time rates whether hourly, weekly or monthly, are also affected, including white collar workers for which the wage drift may take the forms of premiums, bonuses, qualification differentials, promotions, etc.

As the Swedish Royal Commission Report on Stabilization Policy 14/ pointed out, from an economic point of view the wage drift is not necessarily under all circumstances a purely negative factor in so far as it contributes to better performance and, therefore, productivity, or in encouraging shifts in the labour force towards more productive industries. However, in so far as it reflects bottlenecks on the labour market and presses the wage levels upwards beyond productivity increases, it has been giving considerable cause for concern and has subjected the trade union movement to serious internal tensions.

This discrepancy between contractual wage rates and actual wages has also been instrumental in counteracting the efforts of the unions to achieve a more equitable wage structure. Certain progress seems to have been made though in narrowing earning differentials between men and women in the Swedish manufacturing industries. Taking into consideration the retail price

index, the increase in real wages between 1960 and 1965 was 26 per cent for men and 38 per cent for women. On the other hand, in most cases of the various sub-groups in mining and manufacturing, the gains made by male labour which had been below the industrial average, while greater than for the average, were relatively minor and the percentage developments between the various sectors have been rather uneven. 15/

All in all, the best that can be said for centralized bargaining in Sweden as a means to bring about a more equitable wage structure is that the unions' "wage solidarity policy" may have prevented the widening of existing discrepancies but, except in the case of female industrial workers, has had only limited positive success as an overall aim of their wage policy.

The fact that actual earnings and, in many respects also fringe benefits, bear little resemblance to contractually arrived conditions is by no means restricted to Sweden but is widely noticeable all over Europe. It is perhaps no exaggeration to say that the ensuing problems have indeed brought about a disenchantment with the centralized bargaining system in a number of countries.

In Germany collective bargaining is carried out at the regional industry level. However, the Works Constitution Act of 1952 (as well as a similar Act in Austria) empowers Factory Committees representing the employees of individual enterprises to conclude so-called Enterprise Agreements to adjust, in certain respects, the centrally arrived at agreements to the particular conditions of the enterprise.

Such enterprise agreements may not contain any provisions which would be less favourable than the collective agreement by which the enterprise is covered. Indeed, a good deal of additional benefits have been obtained by

such agreements. However, the Works Constitution Act strictly separates the powers of these Committees from those of the unions. Only unions can declare a strike. In practice, this means that the Committees have no recourse against an employer reneging on or pressing for changes in the enterprise agreements, while the unions cannot authorize a strike as they are bound by the "peace obligation" under their contract. Thus, there is an increasing recognition of the uncertainties attached to the benefits obtained by non-contractual adjustments at the enterprise level. This is how the problem is seen by one of Germany's most influential trade union leaders, the President of the German Metalworkers' Union, one of the world's largest, if not the largest, trade union:

> (Translation)
> Although the overall wage, salary and labour policy of the trade unions has been quite successful, the same cannot be said about the system of our collective agreements. According to the old custom they are primarily concluded at the regional level. In practice this has led to large differences between the contractually secured minimum standards and the arrangements made at the enterprise level which can be terminated at any time. During economic recessions the employers try to terminate the wage rates actually in effect that in their opinion are too high. Above all, they try in the case of technological change to withdraw those benefits that are not contractually secured. This is the case above all when, thanks to rationalization, a certain surplus of labour occurs within the enterprise. It is then when many employers feel strong enough to remove non-contractual benefits. This makes it clear what can be expected in situations of less than full employment. It is necessary, therefore, to secure by collective agreement all so called voluntary social benefits. This we want to achieve by a contract policy close to the enterprise level. 16/

The fears that, under conditions of less than full employment and technological change, wage rates and other benefits achieved at the enterprise level but not secured in the regional collective agreements would be in danger, seems to have been borne out during the 1966-67 recession despite the relatively slight overall increase in unemployment. According to a "White Book" published by the German metalworkers union in October 1967, the average

weekly earnings in the metal-manufacturing industry was lower in April 1967 than in October 1968. About 11 per cent of the labour force in that industry were said to have experienced substantial reductions in earnings in some instances despite the fact that the contractual wage rates were to have been increased as of 1 January 1967. Subsequently the agreements concluded in 1968 indicated a strong union pressure to secure the previous "voluntary" benefits in the form of contractual provisions proper.

Another testimony to the same effect is the development towards enterprise level agreement in Italy:

> (Translation)
> ...this centralized structure of collective agreements with their uniform wage tables, inevitably calculated on the productive capacity at its lowest level, appears more and more incapable to guarantee an orderly relationship between union action and technological development....
>
> In the measure as the unions have become convinced that the central agreements do no longer result in wage increases proportional to the increase in productivity, they have been led to bring their negotiations down from the industrial branch level to that of individual enterprises....
>
> This phenomenon, leading to collective agreements at the enterprise level (contratti collectivi aziendali) marks the crisis of the traditional collective agreement, i.e., of the centralized agreement, even if we find ourselves at present in an intermediary phase, where the central agreement is usually incorporated in the collective agreement at lower levels (contratti integrati). 17/

In France the collective wage agreement, never a particularly strong factor in the wage determination of the private sector, appears to have lost all importance in that the contractual wage rates and those actually paid no longer bear any resemblance to each other. 18/

Coupled with the "arms-length" policy of the employers vis-à-vis the unions at the enterprise level, this has further undermined whatever

controlling influence an anyway weak and divided union movement had over the work force--a factor not unconnected with the plant level explosion of May 1968.

The Netherlands and Belgian collective bargaining systems stand in a class by themselves.

A number of European countries have at one time or another experimented with various types of "incomes policy", if with this is meant "the development by government of specific criteria or guides for incomes and prices and the attempt to gain adherence through various forms of public pressures". However, "The Netherlands is the only example where a strict form of incomes policy has existed over much of the post-war period". 19/

For this purpose specific institutions were developed of which three have had a direct bearing on industrial relations in general and collective bargaining in particular:

The Foundation of Labour, a private organization of labour and management representatives, the idea of which goes back to the between-the-war period but which has its actual origin in a clandestine association of employers and trade unionists during the German occupation. It played a key role in establishing wage policy for collective bargaining, as well as other areas of economic and social policy, during the earlier post-war period.

The Socio-Economic Council, established in 1950 as a consultative tri-party body of labour and management representatives and government appointees, the latter not representative of government but as experts. The scope of the Council's function is very wide, especially as the Council Act prescribes that government must consult this body in all matters concerning economic

and social legislation, but in practice much of its influence has been in the field of wages, prices and employment.

The Board of Government Conciliators which, with progressively declining influence, acted until the end of 1967 as a kind of wage control board with originally wide powers, including the approval of all collective agreements.

However, the impossibility of controlling prices as effectively as wages (especially in the open economy of a small country) led to the recurrence of wage explosions following periods of wage stops and wage restraints. Already since the fifties the pressures, especially on the part of the trade union movement, for "freer" forms of collective bargaining, mounted until last year the Board of Conciliators lost its controlling function. 20/

Belgium did not accept as rigid an incomes policy as its Benelux partner but developed nevertheless, in the post-war years, an already incipient system of joint labour-management-government bodies such as the Economic Council, the National Council of Labour, the Prices Commission, the National Council on Economic Growth and a number of Industry Councils (metal, textile and clothing, construction, leather and fisheries) whose influence on the bargaining process has been quite pervasive.

Although single firm agreements and regional agreements still persist, the principal development of collective bargaining has been within the framework of the various sectors of the economy at the national level. 21/

The main instruments of collective bargaining have progressively become the Bi-lateral or Mixed Commission (Commissions Paritaires) institutions which predate World War II but whose importance and numbers greatly increased in the post-war period. They are established by Royal Decree, but in practice

only after the labour and management organizations of the industrial branches over which they have to have jurisdiction reached agreement as to their creation. Because of the prevailing union multiplicity, it is the notion of "the most representative organization" which decides on the composition of the labour representation. The distinguishing feature of the Commission is "parity" (equal numerical representation) of labour and management under the chairmanship of a government official who, however, has no vote and whose effective role varies a great deal between commissions. Decisions of the commissions are only valid if at least half the members of each delegation are present and, with certain exceptions where a three-quarters majority suffices, on the basis of unanimity. They then can become binding by Royal Decree.

With increasing frequency though, collective bargaining also comprises several trades and industries. While such inter-industry agreements may be reached within the National Labour Council, they are often also the result of direct negotiations between the top labour and management organizations.

At the enterprise level, Belgium has developed a double system of shop stewards and works councils but, unlike the latter, shop stewards are based on agreement and not on law. Their importance in "adjusting" national agreements to local conditions has at times been very important.

The Belgian collective agreement system is highly complex not only because of its structure and uncertainties in law 22/, but also because the scope of the agreements vary greatly—from minute regulation to broad rules.

In the absence of detailed information, it is impossible to say how much the centrally arrived at collective agreements of the Netherlands and Belgium correspond to actual conditions, especially in the wage field. It would be

surprising though if they were not to conform to the general European pattern of considerable discrepancies between contractual rates and actual earnings.

"Extension of Contract" as Type of Pattern Setting

Obviously, pattern-setting will take different forms under conditions of the organization-to-organization bargaining relationship prevalent in Europe as compared with Canada. Some types of pattern-setting in the European context have been implicit in the cases cited in the preceding section dealing with the effects of union multiplicity. Moreover, under conditions of full employment wages and working conditions laid down by agreements in the organized sectors of the economy will almost automatically influence the conditions prevailing in the unorganized sectors or enterprises.

However, in a number of European countries (France, Germany, Netherlands and Switzerland) there exists what could be called a legalized form of pattern-setting, the so-called "extension of contract" similar to that prevailing in the Province of Quebec.

"Extension of contract" may be defined as the "process by which a collective agreement is made applicable to employers and workers outside the ranks of the organizations that have signed the agreement", essentially as a device to protect employers and unions against competition by non-organized firms and workers. 23/

Extensions were reintroduced in Germany after the Second World War upon the insistance of both employer and union organizations. In fact, Sturmthal notes as a kind of curiosum that it was the desire of the German unions for the reintroduction of extension of contract that prevailed on them to appeal

to the Allied Occupation Powers to permit the re-establishment of employer organizations.

The extension of a contract can only be proceeded with if the application is made by one of the contracting parties to the original agreement and not upon application by a third, and only if approved by a majority vote of a Collective Agreements Committee established at the Federal Ministry of Labour. Such a Committee consists of an equal number of management and labour representatives appointed by the Minister on the recommendation of the central organizations. If the Committee decides against the extension of contract or cannot reach a decision, the matter is dropped, but even if the Committee is in favour, the Minister may use his discretionary powers to reject the proposal. Extension of contract ends with the termination of the contract to be extended but can also be revoked by the Minister in agreement with the Committee.

Two conditions must be satisfied before a contract can be made generally applicable:

(i) the employers' party to the contract must employ at least 50 per cent of the workers affected; and

(ii) the extension must appear desirable from the point of view of public interest.

These conditions may be waived, however, if the extension appears to be required because of social distress. 24/

In Switzerland, the extension of contracts is governed by general rules laid down in the Federal Constitution (Art. 34/10, adopted in 1947) and more specifically by a federal statute of 1956.

Extension is ordered by the Federal Government if more than one canton (province) is involved or by a canton government, if the agreement only covers that territory, in which case the approval of the Federal Government is still necessary. It can only occur on the request of the parties to the contract and after public notice has been given. The parties must further state which specific terms of the contract they seek to extend.

(i) the employers' side must employ a majority of those concerned in the original agreement and, the workers' side must also constitute a majority of the employees; but exceptions, especially to the latter rule, have occurred;

(ii) the extension must be deemed desirable in the sense that if it is not ordered, the employers and employees who are bound by the agreement may suffer serious hardship;

(iii) the agreement must not be contrary to public policy; and

(iv) the order must not interfere with equality before the law or freedom of associations and must deal fairly with minorities. 25/

Concerning this last provision, the use of extensions in Switzerland involving union multiplicity has already been noted.

France also returned after the war to the system of extensions. Here the Minister may extend a collective agreement to become applicable to third parties upon the advice of a Collective Agreements Board, but appears to have fairly wide discretionary powers to order extensions or not, or extend only parts of an agreement.

The Netherlands introduced extension in 1937 whereby the law enumerates certain provisions of agreements which shall not be included in an extension. Since the end of the war the decision has rested with the so-called Board of Mediators which used to determine whether or not a collective agreement corresponded to pre-determined policies. This function having disappeared since

the end of 1967, the discretionary powers may have reverted to the Minister of Labour as before the war.

Extension of contract can affect management and labour in rather contradictory ways: it may be the prelude to the spread of organization but may also reduce the impetus to organization. Evidence suggests that it may have worked both ways in various countries at various times and under varying circumstances. However, the motivational factors involved in organizational activities are always rather complex and it would hardly ever do to ascribe to some factor alone, such as extensions of contract, any decisive influence either way.

It may be noted here though, that in a number of countries a trend appears emerging for unions to try to negotiate special privileges for trade union members, although not directly related to wage rates. Most recently this trend has come to the fore in Germany. Another related trend is to try to secure for the unions financial compensation for services rendered to non-union members. Switzerland did in fact legalize "agency fees" to be paid by workers who benefit from an agreement without being union members. However, this trend cannot be ascribed solely to legal "extension of contract" but may well be due to the automatism in contract extensions, whether legally supported or not, as well as the above-noted legal aversion against union security clauses and the previous lack of union emphasis on such provisions. Belgian unions, for example, follow the trend of attempting to secure special benefits for their members and, in one instance at least, it was noted that a union did obtain contractually financial compensation for services rendered to non-union members through a service fee to be paid by the employers, but this as a quid pro quo for a no-strike pledge.

The Locus of Decision Making

Quite apart from the uncertainties and vagaries of wage determination which paradoxically is the effect of the centralization or over-centralization of bargaining, there are two other aspects of the issue which deserve attention on the basis of European experience. One concerns the upward shift in the locus of decision making, the other the implications of the broadening of the areas of possible open conflict.

Centralized bargaining by organization with organization or, in specific institutions based in public law such as the "Mixed Commissions" in Belgium, as well as the various attempts and methods to subordinate the bargaining process to pre-determined economic and social policies such as for example in the Netherlands, tend automatically to shift the locus of decision making upwards. That goes for employer organizations as well as for unions but it is very largely a trade union problem.

Decades of struggle for political rights, for freedom of association, for recognition as an organized economic force; all this shaped the European labour movement in many countries and created a tendency to regard the freedom of the collective as more important even for the individual as the freedom of the individual itself.

Thus the instrument of ratification of the collective agreement by membership vote either did not develop at all or has progressively fallen into disuse as the organization-to-organization relationship developed and the centralization process progressed. This enforced upward shift in the locus of decision making will then express itself in such phenomena as the provisions in the by-laws of the Swedish LO according to which the executive of

each of its affiliates must have the right of veto over any membership vote on collective agreements, and the so-called "Three Per cent Rule" which subjects any strike action involving, or threatening to involve, more than three per cent of the membership to the scrutiny of the central secretariat; or, as in Germany, where the by-laws of the Deutscher Gewerkschaftsbund (German Federation of Labour) (DGB) not only subject each union to stringent provisions as to the methods of the strike vote but also, under certain circumstances, an intended strike action to the approval of the central body.

This should not imply any lack of internal democracy under all circumstances but rather the acceptance of the concept of representative democracy over direct democracy also in the trade union movement. According to that concept the trade union officer is elected as a plenipotentiary and must take full and final responsibility for all his actions, including setting his signature under a collective agreement, while taking the chance of defeat at the statutory membership meeting or convention if he should have misjudged the temper or will of the membership.

However, large unions, like all mass organizations, are constantly haunted by the fear of the leadership losing contact with the membership and the centralization process has not been very helpful in that respect. The implicit powers are by no means always welcomed by the top leadership. For example, a move at the last (1966) LO convention to give the central body even greater statutory powers was deflated by the LO leadership itself with the telling argument that there were difficulties enough in ascertaining the will of the membership.

The greatest difficulty appears to lie in the fact that due to the participation of only a relatively small leadership group in the decision-making

process at the national level, some of the most important aspects of union activity become "invisible" to the individual worker. If to this is added, as in some countries, the absence of an effective union machinery to deal with individual plant-level problems, the unions may well be regarded by the membership as just another piece of bureaucratic machinery.

In the Netherlands the Dutch Metalworkers' Union undertook a critical investigation of its own functions and manner of operations:

> This self-examination was motivated by a number of internal difficulties in almost all Dutch trade unions. These difficulties have been and are being evidenced in marked fluctuations in the composition of membership, meagre participation, lack of association and from time to time in unofficial strikes. As an explanation of these difficulties it is pointed out first and foremost that the strong concentration of policy on social economics, in connection with the far-reaching influence exercised by the authorities and guidance of the state of trade, is rendering invisible the trade union influence on the development of wages and working conditions. 26/

There is evidence for practically all the countries of centralized trade union structures that the upward shift in decision making endangers a healthy and vigorous organizational life. Various experiments are being made to overcome the communications gap between the plant-level work force and the union, respectively, union leadership sometimes taking curiously contradictory forms. The above-quoted re-examination in the Netherlands convinced the union in question that it had to reactivate the plant locals to make its officers better aware of plant-level problems. In Sweden, on the other hand, the move seems to go into the other direction, namely towards the creation of local multi-enterprise and possibly multi-union units, to bring about greater cohesion and co-ordination of union activities at the local level and to give the local units greater weight in union affairs.

However, there are further means to encourage the downward and upward flow of information within the unions. One is undoubtedly the trade union education system, the importance of which can hardly be overestimated in countries such as Scandinavia, Germany, Austria, Holland, Belgium, and Switzerland; the other—the works representation (shop steward) bodies, especially, where, as in Germany and Austria, they are based in public law with specific rights and duties.

Nevertheless, the locus of decision making in all essential matters of trade union policy rests in practically all the countries mentioned above at the national level. The union relationship at the plant-level, both with the work force and the employers, remains one of the major problems of centralized trade union structure.

The Broadening of the Conflict Area

The question may well be asked whether or not there is any connection between the centralization of the bargaining process with consequent upward shift in the locus of decision making and a low incidence of open conflict (strike-lockout).

Both on logical and empirical grounds the view can be defended that where whole sections of the economy are affected, centralization of bargaining broadens the areas of possible conflict. Organizations on both sides have in a number of European countries developed into a kind of "super powers" where open conflict between them could assume proportions of a magnitude the threat of which acts as a deterrent; therefore also the need to curtail the autonomy of individual unions, management associations and individual employers, and therefore also the increasing need for new institutional arrangements of mutual accommodation.

However, the danger of possible conflict always remains and may well threaten the whole cherished system of "self-government" of the labour market by creating situations in which political intervention becomes inescapable, as with the broadening of the conflict area also, the public interest becomes more and more directly involved.

Despite what has been said on the preceding pages, it would be very rash, on the basis of available evidence, to predict the direction of the future evolution of the European bargaining systems under discussion. Systems which have evolved over many decades are not prone to radical and sudden changes. Too many institutional and legal factors militate against them. All that is indicated is that, generally speaking, the centralization process in the European industrial relations systems may well have reached a high water mark with signs of the possible reversal of a trend which for so long has been their outstanding characteristic.

However, the purpose of the foregoing discussion has not been to pronounce on the probability of such a reversal leading to an approximation of the European and North-American systems, but rather to indicate that each system has its own set of problems and difficulties which cannot be overlooked if the relevance of European experience is to be assessed.

NOTES AND REFERENCES

1/ In "Labour Relations and the Law", a Comparative Study, edited and with an Introduction by Otto Kahn-Freund, Stevens and Sons, London, 1965, p. 3.

2/ Ibid., pp. 7-8.

3/ Dr. Hans Reicher and Dr. Otfried Wlotzke, "Collective Bargaining and the Law Governing Collective Agreements", Federal Ministry of Labour and Social Structure, Bonn, Monograph 19, pp. 4-5.

4/ Arbetsdomstolens Dom. Exp. Nr. 11/1966, published by TCO Information.

5/ See Jean Savatier in Revue Internationale de Droit Comparé, janvier-mars 1967, pp. 45 and 56.

6/ Folke Schmidt, "Kollektiv Arbetsrätt", P.A. Norstedt & Söner, Stockholm, pp. 57 and 123.

7/ Guilano Mazzoni in Revue Internationale de Droit Comparé, janvier-mars, 1967, p. 64.

8/ See Alexandre Berenstein, "The Law of Collective Agreements in Switzerland" in Kahn-Freund, op. cit., pp. 123-24.

9/ "Wage Policy in Sweden, Theory and Practice", LO Utlandsinformation, Stockholm, pp. 4-5.

10/ Economic Council of Canada, Third Annual Review: Prices, Productivity Employment, Ottawa, Queen's Printer, 1966, p. 67.

11/ Skandinaviska Banken, Quarterly Report 1967, No. 2, p. 3.

12/ "Wage Policy in Sweden", op. cit., p. 5.

13/ A mimeographed summary of the discussions on wage policy at the 1966 LO Convention states: "It would be unrealistic, in the Executive Board's opinion, to reject in principle the system of pay by performance".

14/ Mal och Medel i Stabiliseringspolitiken, SOU 1961:42, pp. 27ff.

15/ Report on Wage Developments 1960-65, to LO Convention, 1966 (Mimeographed).

16/ Otto Brenner, Speech before Second Conference on Rationalization and Automation published in "Automation, Risiko und Chance", Europäische Verlagsanstalt, Frankfurt, a.M., 1965, Vol. II, pp. 1107-8.

17/ Guiliano Mazzoni in Revue Internationale de Droit Comparé, op. cit., p. 70.

18/ Jean Savatier, ibid., p. 52.

19/ David C. Smith, "Incomes Policies: Some Foreign Experiences and Their Relevance to Canada", Economic Council of Canada, Special Study Number 4, 1966, p. 186.

20/ For more details concerning the Netherlands wage policy and institutional system see "Digest of the Kingdom of the Netherlands Social Aspects" and David C. Smith, op. cit., pp. 129-46. Both publications predate, however, the most recent changes in the Dutch collective bargaining system.

21/ For details concerning the legal and institutional aspects of Belgian collective bargaining see André Lagasse, "The Law of Collective Bargaining and Collective Agreements in Belgium", in Kahn-Freund, op. cit., pp. 62-77.

22/ On January 15, 1969, the Belgian Parliament enacted a "Law Concerning Collective Agreements and Mixed Commissions" intended to end these legal uncertainties. Originally drafted by a Minister of Labour of the Christian Social Party, the Bill was guided through Parliament by his socialists successor, a former General Secretary of the Belgian General Federation of Labour (FGTB). Thus it has the undoubted support of the two main components of the Belgian trade union movement. The new law recognizes the powers of employer and workers' organizations to negotiate collective agreements, determines the persons covered by such agreements and establishes their binding character.

23/ A. Sturmthal, "Contemporary Collective Bargaining in Seven Countries", The Institute of International Industrial and Labor Relations, Cornell University, Ithaca, 1957, p. 327.

24/ Reicher and Wlotzke, op. cit., pp. 7-8.

25/ Alexandre Berenstein, op. cit., pp. 122-23.

26/ Article on "Trade Union and Company" by C. Poppe, Plant Sociologist of the Dutch Metal Workers' Union (AMMB), in Bulletin of the International Metalworkers' Federation, No. 29, August 1967.

CHAPTER IV

THE PUBLIC INTEREST

The Public Interest and Industrial Conflict

The European Social Charter enjoins the signatory governments to recognize:

> ...the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

Two aspects of this provision in the Charter deserve particular attention: first, it declares the right to strike as a universal right (notwithstanding that in a number of countries the right to strike is held not to include certain categories of workers, more specifically a certain type of civil servant): second, it takes note that a collective agreement may entail a "peace obligation" for the duration of the agreement, and third, it implicitly recognizes the distinction between conflicts of interest and conflict of rights, which plays an important role in a number of European industrial relations systems.

It has to be recognized, however, that there are a great many differences between the various countries as to the degree to which problems of industrial conflict and related questions have been considered and elaborated

in law. And there are further great differences in the ways (constitutions, statutes, judicial decisions) in which the public interest is brought to bear on the exercise of the right to collective action.

One thing is certain:

> There is no correlation between the incidence of stoppages (either in terms of number of stoppages or in items of working days lost) and the elaboration of the law of strikes; nor is there any visible connection between the interest shown in this branch of the law and and the degree of prosperity enjoyed by a given community. 1/

One may go even further and state that there is no visible correlation between any particular industrial relations system and the incidence of open conflict. The Swedish industrial relations system had undoubtedly many admirable features that are absent in other European countries. Yet when it comes to the question of incidence of open conflict, the record of Austria, Germany, Switzerland, the Netherlands, in fact of practically all the countries of Western Europe, is as good or about as good as that of Sweden--with the significant exception of France and Italy.

It would indeed be intriguing to speculate on why France and Italy deviate so strongly from the pattern prevailing in the rest of Europe. It is true that in none of the other countries a sizeable part of the labour movement has come under communist leadership. But is this a cause or a symptom? 2/ Moreover, the spontaneous plant level revolt in France in May 1968 revealed the weakness rather than the strength of this leadership.

But even more puzzling may appear the fact that France and Italy during most of the post-war period have been amongst those countries with the best growth performance in real national income 3/ as well as the most favourable increases in labour productivity, outpacing The Netherlands, Denmark and

Belgium with a much more peaceful industrial relations scene (periodic disturbances in Belgium apart) and far less social turbulence.

Thus, it is hardly possible to reduce the public interest in industrial conflict solely to an economic motivation (although this may play an important role in individual instances) but must relate to such intangibles and immeasurables as the values placed on the peaceful relationship between opposing interest groups, fairness, social justice and social progress. 4/

The Right to Strike as a Civil Right

The universality of the right to strike as it comes to expression in the European Social Charter can be traced to the fact that it has achieved the status of a basic civil right in practically all European countries. There are indeed several European countries in which the right to strike is specifically guaranteed in the constitution or is deduced from other constitutional civil rights guarantees, or, is simply regarded as an emanation of freedom of association:

> To appreciate the significance of the Constitutions, especially in France and Italy, one must bear in mind the Continental tradition of the strike as a political and economic weapon the use of which belongs to the fundamental rights of the citizens. Though not identical with the right of association, it may be its emanation, but, as it happended in France and in Italy, it may be separately guaranteed in what corresponds to a Bill of Rights. This political or constitutional tradition accounts partly for the sharp jurisprudential distinction between the "mere freedom to strike" and the "right to strike" which is so important, especially in France. Freedom to strike is no more than the absence of prohibitions, but a right to strike is guaranteed against limitations by a law or contract, except where the means employed or the aims pursued by the strikers take the strike out of the scope of the constitutional guarantee. No corresponding right to lock-out exists, the right to strike must be understood as a privilege deliberately bestowed on the economically weaker party. 5/

It is interesting to note, however, that the development of jurisprudence concerning the right to strike shows marked differences between the countries with specific constitutional guarantees. The Preamble of the French Constitution embodies the right to strike by stating "the right to strike is recognized within the frame of the law which regulates it". Very similarly, Article 40 of the Italian Constitution guarantees the right to strike within the ambit of legislation which was then to be enacted in order to recognize the exercise of the right. However, in neither country was such legislation ever passed. The history of European labour legislation is indeed strewn with unsuccessful legislative attempts to regulate the right to strike. The reason has been the inherent difficulties in formulating such legislation which becomes either too permissive in the eyes of some or too restrictive in the eyes of others, especially in those of the trade union movement and their political allies who regard any strike legislation as restrictive per se.

Thus, the transformation of the constitutional guarantees into positive law was left to the courts. The question of the applicability of the Preamble of the French Constitution in the absence of specific legislation was long a subject of discussion and has been clarified only in so far as the Conseil d'Etat proclaimed that the Preamble did in fact contain general principles of law which had to be applied by the courts. Very similarly, the Italian courts have since 1951 departed from their previous approach that the old law repressing strikes was still in force and that Article 40 was only "programmatic". In a fundamental change the courts began to treat the constitutional provision as " embodying a legal principle with the immediate effect of authorizing the free exercise of the right to strike". 6/

The Italian courts have been relatively liberal in the interpretation of this free exercise of the right to strike. The general principle prevails,

however, that a strike, to be legal, must further economic interests and therefore must have as the object the achievement of something which is in the power of the employer to grant. This then would exclude the political protest strike and, although the courts have been vacillating on this, the sympathy strike. However, these categories of strike action do not constitute a criminal offence and "participation in such strikes falls within the scope of the individual's general freedom of action", although constituting a civil wrong for which the employer may dismiss strikes without notice, while a lawful strike is considered merely a suspension of the contract of employment and the employer has no right of dismissal. The right to strike is further defined not only in the light of its aims but also in that of the ways of carrying out the strike. This problem arises in cases such as a "go-slow". While the courts recognized that some damage to the employer was inevitable in a strike, permitted damage could not include that "caused by disorganization from the irregular and intermittent performance of their work by employees".

In France the strike which the law accepts as legal involves a total stoppage of work and a vacation of the place of work by the employees. The ordinary strike is thus "typically one which takes place outside the environment of the contract of employment". Strikes may be unlawful because of the means employed and the ends in view. Thus the courts in France have termed "go-slow" strikes and "sit-down" strikes as illegal, in which cases the employer may have recourse to dismissal. As to the aims of a strike, it would be (in the view of the courts) illegal if their objectives are unconnected with the defence of the employees' interests as such and inconsistent with such principles as the freedom to organize. It would not be legal to use strike action to endorse the dismissal of an employee who does not belong to

the union. The political strike designed to bring pressure on the government to cause it to change its course of political action, in particular, would be illegal as the Cour de cassation has held that strikes are lawful only when they seek to change or improve terms of employment and not to achieve political ends.

Court decisions have been less clear cut in the case of "rolling strikes" i.e., strikes affecting one or another units of an industry or various sections within a particular firm, as well as in cases of sympathy strikes. 7/

It hardly needs to be pointed out that Italian and French jurisprudence in question of the law of strikes is one thing and the reality of industrial life another. The protest and political strike to promote or prevent legislative action is not only a frequent occurrence but also a very potent weapon and mass defiance of the law (such as also in the case of sit-down strikes) effectively prevents legal prosecution. This gap between law and reality only underlines the arrested development of the employer-employee relationship in these two countries when compared with the rest of Western and Northern Europe. It is a symptom of the plant-level weakness of both the Italian and French trade union movements rather than any sign of their strength.

In Germany it is the prevailing view that the constitutional guarantee has not produced an absolute "right" but only a "freedom to strike and lock out".

The right to conduct industrial disputes is not explicitly guaranteed in the Constitution which only guarantees "the right of association for the safeguarding and improvement of the conditions of employment". On the other hand, industrial disputes are not forbidden by the Constitution and their legality derives mainly from historical evolution, from the principles of a

free constitutional government for the benefit of the governed, and from the general right of free development.

> Accordingly, the right to strike and the right to lock-out exists as a matter of principle. The government must remain neutral as regards industrial disputes and cannot restrict or prohibit them on a general basis....
>
> Although, in principle the strike and the lockout are regarded as legitimate weapons in industrial disputes, and are, therefore, not illegal or impermissible, they still must remain within the confines of the legal system as regards their ends and means. To this extent limits are set to the freedom of strike and lockout; their contravention renders the right to strike or the lock-out an illegal, or irregular act within the meaning of civil law. An individual instances, strikes and lockouts may be impermissible if they are in contravention of laws or contractual provisions (e.g., in conciliation agreements). Industrial disputes which are in themselves legitimate may also become impermissible because of the manner in which they are conducted. 8/

Only a "freedom", but not a "right", having been established, this freedom may be restricted and the Federal Labour Court has taken the line that civil law has this effect. In consequences and from approximately 1953 onward, the court, by a series of decisions, has increasingly narrowed the area in which industrial stoppages remain permissible. "In general this tendency favours the employers. Sometimes this tendency is clearly expressed." 9/

German jurisprudence, then, differentiates between types of strike as to origin and conduct (official and unofficial strikes); as to the numbers involved (full-scale strike and partial or selective strike); by the nature of the demands (improvement or maintenance of conditions of employment, sympathy or solidarity strikes, demonstration strikes, political strikes, strikes endangering the state); and on the lockout side, the "offensive lockout", the "defensive lockout", and the "sympathy lockout".

The freedom to strike and lockout are restricted by obligations of the collective agreement. These obligations consist of the general duty inherent

in any collective agreement to maintain industrial peace during the period of its currency. However, it may be noted that this "peace obligation" only extends to the specific contract. The differentiation in the German collective agreement system between various types of collective agreements would make it in fact possible to call a legal strike after the expiration of a wage agreement, even though the standard agreement covering conditions of employment continues to be in force. Moreover, the absolute obligation to keep the peace is made somewhat more flexible by the possibility to give notice of termination of the agreement if, for example, in cases of wage agreements, the economic conditions have radically deteriorated from those prevailing at the conclusion of the agreement. The Labour Court has, on the other hand, strengthened the peace obligation by extending it over the negotiation and conciliation stage making the strike vote impermissible during such proceedings.

A strike becomes further impermissible if it is not aimed at the opposite party for the purpose of the collective or local adjustment of wages and working conditions. A dispute in support of political aims, and thus directed against governmental authority, is in particular not permissible.

A dispute is not legal if it is not conducted by parties empowered to conclude collective agreements. As this right accrues only to trade unions, employers' associations or individual employers, an "unofficial" strike, i.e., a strike not conducted by a union, is therefore illegal <u>but</u> it can <u>become</u> legal if it is taken over by a trade union.

An important notion of German law is that of the strike "contra bonos mores" (disputes violating public morals). Whether or not a dispute may be "immoral" may depend on the aims of the dispute, the methods by which it is

conducted and if there is a disparity between methods and objectives. This had given cause to a host of restrictions: disputes become impermissible if the dispute is intended to cause the economic destruction of the opponent; if it is over a matter of power or principle without justifiable reason; if it is conducted with the intention of punishing a political or trade union opponent; if it aims at restricting the opponent in the exercise of its constitutional rights, for example, to compel an employer to dismiss an employee who refuses to join a trade union or who belongs to a specific party, denomination, or race.

A dispute would also be regarded as against public morals if the methods by which it is conducted are objectionable, such as by making false, distorting or inflammatory statements, but also by the use of force. A dispute would become impermissible, even if otherwise legal, if the organization supporting it has sanctioned such acts or, despite its knowledge of such acts, failed to intervene against them. On the other hand, excesses committed by individuals would not suffice to render the dispute as such illegal, although the persons concerned remain punishable. Also, the choice in time may be a factor if such choice could lead to the destruction of the opponents means of livelihood.

Finally, an industrial dispute is "in general and in particular contrary to public morals if the losses caused by a dispute which in itself is permissible, do not stand in a reasonable relationship to any advantages which may accrue". This notion is of special importance in the question of essential industry disputes (see below).

It is clear that the notion of the strike in violation of public morals, as well as that of having to stand in a reasonable relationship to any

advantages to be gained, have introduced into German labour law a great deal of subjectivity. Moreover, as a further result of the case law of the Labour Court, a much heavier liability for the consequences of strike action has developed, the more so as the onus of participating in a stoppage may rest with the individual worker. All this may well have been instrumental in developing the extremely stringent rules under which German unions may give approval to strike action. Thus the statutes of the German Trade Union Federation (DGB) (Deutscher Gewerkschafts Bund) prescribe that such approval may only be given if all attempts at conciliation and negotiations have failed; if at least three-quarters of the workers involved in the dispute have been organized for 26 weeks; if approved by a secret ballot of the union members with a three-fourths majority; and, "if the industrial situation and other circumstances make success probable". There are further provisions which, as already mentioned, restrict the freedom of the individual unions in taking strike action under certain circumstances. This, on the other hand, also increases the moral force of the whole movement behind a strike should it be found necessary. The use of the strike vote as a means of pressure has indeed become one of the favourite tactical weapons of the German trade unions.

The German trade union movement has hitherto apparently shown little inclination to resist the restrictions on its freedom of action brought about by the case law built up by the federal Labour Court. It is not difficult to see behind the contrasting development in Germany on the one side and in Italy and France on the other, the contrasts in political and social climate. On the other hand, there has not developed in Germany a similar rapprochement between unions and management as, for example, in Sweden. Undoubtedly, restrictions or not, German labour has made impressive gains socially and economically since the end of the Second World War, but there can be equally

little doubt that in the German public mind (including its labour force) a high incidence of industrial conflict is still closely associated with the period of the Weimar Republic which saw an annual involvement of more than one million workers in strikes and lockouts, with the rise of National Socialism leading to the catastrophy and defeat in the last war and the consequent partition of the country. With regard to industrial disputes in Germany, one can frequently hear the same argument on the part of employers and unions: social warfare is impermissible in a Germany of which the other half is under Communist rule.

Austria, Belgium and Switzerland may be taken as examples of countries where legislation has only indirectly touched upon the problems arising from industrial disputes.

Austria is an almost extreme case of an industrial relations system that is based far more on traditions and practices—and the outcome of intense power struggle—than on any specific legislation. Bargaining rights flow primarily from the right of free association. Both management and labour are highly organized and only Sweden may surpass Austria in trade union organization. The strike is legally neither forbidden nor permitted and, therefore, there are no obligatory rules as to the circumstances under which a strike may take place. Nevertheless, as if to underline Kahn-Freund's dictum that there is no correlation between the incidence of industrial disputes and the interest the law takes in this branch of labour law and despite a previous history of extreme militancy on the part of management and labour, very few industrial disputes have led to open conflict in Austria since the end of World War II. Here too, the tragic experience of the between-the-wars period, of foreign occupation and the present

exposed position of the country, have contributed greatly to restrict industrial warfare to a minimum.

Despite the fact that there have been five general strikes in Belgium since the beginning of this century (and several strikes have been for mainly political reasons) Belgium law too has not directly dealt with the question of industrial disputes.

Rules such as the obligation of giving strike or lockout notice may be found in the Belgian collective agreements arrived at in the Mixed Commissions as well as in certain rules the Commissions have adopted for themselves and in agreements outside the Commissions. However, "the difficulties in applying the non-legal rules, stem from the absence of any legislation to speak of on collective agreements and on the status of trade unions". 10/

Nevertheless, André Lagasse holds that apart from the limitations on the right to strike which may be contained in agreements, there are several ways in which the right to strike may be limited. Only a "real" strike, that is a complete stoppage, is legal, as the decision to strike must be collective. Measures of exerting economic pressure other than the strike are not permissible, especially if they are capable of causing great loss, such as a "go-slow". Although in Belgian law there are no requirements to follow any particular procedure, certain steps must be taken such as attempts at conciliation, notification of strike action, etc. However, these obligations do not arise from any strike legislation but are derived from the social insurance legislation. Belgian workers are entitled to unemployment benefits during strike action provided the provisions of the Social Insurance Act are fulfilled. Obviously this does not constitute a restriction on the right to strike but acts, at best, as a restraint to wildcatting. Lagasse further

notes that the question "whether or not there is a corresponding right for employers to lockout is much more open to question".

Switzerland also has no special legislation on strikes and lockout or on the means employed in an industrial dispute. The right to strike is regarded as an emanation of the right of association and strikes and lockouts are perfectly legal. However, an act may become unlawful if done for an unlawful purpose. For example, a political strike calculated to overthrow the constitution or the government by violent means would be high treason. Even if no criminal offence is involved, a strike or lockout may be unlawful for the purpose of civil liability if its object is contrary to some general principle laid down by the law. Those who suffered damages may bring action in civil courts for damages against the association which organized the strike. This would be the case if the purpose was, for example, to exclude non-union members from certain employment. In fact in 1956 the Code of Obligations was amended to make the closed shop illegal. Furthermore, if a dispute is "intercantonal" the Federal Act of 1949 provides that no hostile action may be taken during conciliation and arbitration procedures. Several cantons have similar provisions.

Concerning the peace obligation, Swiss law makes an interesting distinction between "absolute" and "relative" peace obligation. The absolute obligation exists if it is laid down in the contract itself. The relative duty implies that no hostile action may be taken in respect to matters covered in the contract. In cases where there is a duty to maintain industrial peace, not only strikes and lockouts are illegal but also other methods of collective pressure such as boycotting and blacklisting; some agreements even cover attacks in the press. 11/

Swedish law only partially treats the question of collective action—strikes, lockouts, boycotts and sympathy action. 12/ All these are perfectly legal with the exception of specific restrictions as provided in limited form in the Collective Agreement Act of 1928. It should be noted that there is no complete ban on direct action and no general prohibition of sanctions during the period of an agreement. In principle, economic sanctions can be used over a matter not regulated by a contract while in force, covering other subjects. The principle was endorsed by the Labour Court which ruled, however, that "direct action may not be taken by one party, if the other side asserts in good faith that the dispute relates to a matter regulated in the contract until the Labour Court has decided whether the dispute is an unresolved non-justicial dispute. This in practice clarifies the peace obligation". The right to sympathetic action is practically unlimited according to the Act. The only requirement is that the side being supported, i.e., involved in a primary dispute, is itself entitled to economic sanctions. "The provisions on sympathetic action make far-reaching modifications to the peace obligation because of the insistance that purely sympathetic action is a fundamental bargaining weapon." (Johnston also remarks that this insistance came above all from the employers' side.)

The practically unrestricted use of economic sanctions in interest disputes permitted by the 1928 Act gave rise to abuses that created the pressures on the parties leading to the 1938 "Basic Agreement". This defines the concept of direct action much more incisively than the legislation and, for example, completely bans action if the object is to persecute anyone, a party to a dispute or a neutral, on religious, political or similar grounds and in a number of other situations. Moreover, it bans retaliation of any kind against anyone who has been connected with a dispute after it is settled.

In the thirties, public opinion in Sweden was particularly exercised by the question of defining and safeguarding the rights of "third parties" affected by a dispute. As was to be expected the definition of a "third-party" created some difficulties and the Agreement used, therefore, the negative approach of stating the circumstances in which an outside party is "non-neutral". The principle prevails that neutral third parties must have at least as much protection as the parties to the dispute in cases of negotiations of a collective agreement, but this provision is modified by both the Collective Agreements Act as well as the Basic Agreement by permitting economic actions against third parties for sympathetic purposes. The Agreement also permits "secondary boycott" such as handling of goods destined to reach an enterprise involved in a primary dispute. Protection is also given to neutral third parties in disputes about the negotiation or application of individual contracts of employment, in competitive disputes over job opportunities and in order to induce a party to join or prevent him from leaving a labour market organization. In the two last instances what is involved are disputes between workers whereby the employer would be the "neutral party". However, if there is an organizational clause in the contract, workers can use pressure against the employer in disputes over job opportunities.

The Agreement refuses protection to "non-neutral third parties" defined as members of an organization who are involved in a dispute and neglect their obligations to their organization, all strike breakers, employers who engage workers locked out during a dispute, and anyone who has a controlling interest in a company that is party to a dispute.

Protective work can be carried out. However, the definition of protective work is rather vague in the Basic Agreement in the assumption that a

more precise definition would be forthcoming in the agreements at the industry level as appropriate to the character and requirements of each industry.

The cases where possible violation of the Agreement under Chapter IV of the Agreement (Third Party Protection and Protective Work) reached the Labour Market Council for settlement have been exceedingly rare. It will have been noted that there are few forms of collective economic action which per se are forbidden under Swedish law and agreement. All that is really involved is to distinguish between "fair" and "foul" in their application which is a matter more of social morality than of law. Legislation in particular has been seldom used to regulate the employer-employee relationship, and that only with due caution, especially as there was never any great inclination either on the side of labour or of organized management in Sweden to demand such legislation.

Reducing the Incidence of Industrial Conflict

The European Social Charter obligates the signatory governments

> ...to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes.

Two terms in this provision of the Charter stand out: "to promote" and "voluntary". The implication appears to be here that while voluntary arrangements between the parties on the labour market are desirable and to be aimed at, not all countries have yet renounced, or found it possible to renounce, all elements of compulsion in dispute settlement.

In addition, while the Charter in this context speaks of "labour disputes" in general terms, it is clear from other provisions of the Charter

(such as the above-quoted paragraph on the right to strike) that a distinction has to be made between "conflicts of interest" and "conflicts of rights". This is a distinction which runs fairly consistently through European thinking on dispute settlement, but has been perhaps most consistently applied in Sweden where it appears as the distinction between "non-justiciable" and "justiciable" disputes:

> Non-justiciable disputes involve disagreements about matters which are not regulated by contract or statute, and no legal rules or norms are provided for their solution. Justiciable disputes, on the other hand, involve disagreements about the rights and obligations that arise from the provisions of a statute or contract, collective or individual. These cannot always be resolved by reference to legal norms, but in general, since there is an agreement, a contract or a statute to be interpreted, they are more suited to a legal approach than non-justiciable disputes. 13/

In less technical terms, what usually is involved here is a conflict between employers and union as to the terms of the contract to be reached as opposed to an infringement of the contract terms, such as may be involved in a "grievance" or a violation of a statute such as, for example, labour standards. Since in many European countries unions have no or insufficient machinery to deal with plant-level problems or, as in Germany and Austria, these may be entrusted by law to plant-level but non-union bodies, the courts may play a highly important role in matters which in Canada would be more often subject to grievance and arbitration procedures established by contract. This does not preclude the side-by-side existence of private and public settlement machinery, but the institution of special tribunals in a number of European countries, the so-called "Labour Courts", underlines the point made above.

The Role of Labour Standards Legislation

To this then has to be added that labour standards legislation does play a much larger role in many European countries than it does in Canada or in the United States. Together with the wide range of social security provisions, the standards set by legislation correspond more often to actual practice than on this continent. Historically this may be due to the fact that in many instances, thanks to early political action, standards and social security legislation, hours of work provisions, protection of special categories of workers, etc., predated the acceptance of collective bargaining as a source of determining working conditions, while in North America such legislation very often served to confirm the gains made in collective bargaining. This does not mean that in more recent years collective bargaining in Europe has not served to improve on the provisions of the law or gave the impetus for rising legal standards. Generally speaking, though, the consequence of legislation as the determinant of actual working conditions will, in many European countries on the one side, limit the scope of the collective agreement, and on the other, encourage the tendency to settle certain disputes in courts of law simply because they concern violations of the law rather than infringements on the terms of an agreement.

The Labour Courts 14/

Thus, there developed in a number of countries, Austria, Belgium, France, Germany, Denmark, Norway, Sweden and Finland, the tradition of special tribunals concerned with rights disputes. It should be clear, however, that they must not be confused with wage boards or similar institutions which still exist here and there largely as relics of war and post-war wage and price controls or of attempts at income policies.

There are great variations, though, between the labour courts in the various countries as to accessibility, jurisdiction and ranking within the hierarchy of the courts, if this expression is permissible.

What they have in common is, above all, the purpose for which they have been established: namely, to accelerate decisions, save expenses in lowering court costs and reduce the need for attorneys and, even more important, that they "place the decision making process at least partly into the hands of persons who by training and experience have a working knowledge of labour relations practices and customs". 15/ To this end the labour courts in Europe are composed in whole, or in part, of lay judges selected by a competent minister from amongst persons whose names are submitted by the employer and union organizations. The exception is France where the labour court judges are elected.

As to accessibility, in the Scandinavian countries a case can be brought before the labour courts only by a union and employer organization. In practically all other countries any employer and employee has direct access to the court. In most labour court countries the courts will make a strong preliminary effort to mediate each case as the possibility of obtaining an agreed settlement often has not been exhausted. The restriction placed on the Scandinavian courts only to hear cases filed by organizations has, on the other hand, the result that usually a more thorough effort is being made to obtain an agreed settlement before the case reaches the courts.

Concerning appeals, in Germany and Austria for example, decisions of the labour courts may be taken to state (provinces) and national levels where there are also lay judges involved. In France appeals go the special "social sections" of the regular appelate courts, staffed entirely by jurists. In Denmark, Sweden and Finland there is no possibility of appeal.

In a number of countries, Germany above all, one of the prime functions of the courts may well have become the clarification of the law by establishing a body of interpretation and case law which then guides the parties on the labour market and reduces the incidence of actual recourse to the courts in rights disputes. The influence of the Federal Labour Court in Germany on the development of labour law has been tremendous, especially in the area of the right to strike, and as far as that court is concerned, one could well paraphrase a famous United States saying: "German labour law is what the Federal Labour Court says it is".

The German Labour Courts 16/ in approximately their present form, were established in 1926. They are open to all workers and employers whether or not affiliated with a union or an employers' association. They may only hear "secondary disputes", i.e., disputes which could not be settled between the employer and the employee or between the employers' organization or the union. This is due in effect to a definite prohibition imposed by the Allied Control Council during the occupation "in an effort of the occupying powers to encourage free collective bargaining as against the tradition of compulsory arbitration".

All German labour courts are tripartite which in itself fosters and is designed to foster compromise rather than judicial decision. This is also partly a matter of legal requirement for labour court judges are directed to seek a settlement mutually acceptable to the parties. Judges are selected for promotion partly on the basis of the percentage of cases which they settle without a decision:

> Labour Court judges, also, are subject to reappointment every three years, and since they are full-time employees of the government making a career in this field, they are not anxious to secure the enmity of either the unions or the employers, both of whom are consulted on

continued acceptability. In a society with conflicting class ideologies, compromises are safer than decisions on the basis of principles which may fail to have mutual support. The compromise spreads responsibility over several individuals. 17/

In Sweden, unlike in Germany, there is only one Labour Court.

According to the Swedish Labour Court Act of 1928 (Amendments 1937/45/47) the Court is competent to deal with disputes relating to one or more of the following matters:

— the validity, contents or interpretation of a collective agreement;

— questions whether a particular action is contrary to a collective agreement or the provisions of the Collective Agreements Act;

— the consequence of an action which is deemed to be contrary to a collective agreement or the above-mentioned Act.

The competence of the Swedish Labour Court does include cases related to individual employment agreements that are covered by the provisions of a collective agreement but the Court is not empowered to deal with individual contracts of service which are not based on collective agreements. Such disputes are taken to the ordinary law courts.

All members of the Swedish Labour Court are appointed by the Crown. Two members, the Chairman and the Vice-Chairman, must be jurists and a third judge must be a person with industrial relations experience who may, however, not be identified with either of the parties on the labour market. The other four are appointed upon nomination by the interest organizations.

McPherson and Meyers sum up the characteristics of the French labour court system in comparison with other European labour courts this way:

(1) Unlike most labour courts, it is bipartite. Except for the Belgian courts of original jurisdiction, other European labour courts are tripartite.

(2) Judges of the French labour courts are elected. The practice elsewhere is for appointment of the lay judges from lists of nominees submitted by employer and worker organizations.

(3) While the availability and procedural characteristics of appeals procedures vary from country to country, tripartite appelate labour courts are usual in systems providing for ready appeals procedures. In France, appeals are to the regular appelate courts, though, to be sure, social chambers, still composed of non-representative jurists, have been created in both the Courts of Appeals and the Supreme Court.

(4) The French labour court system is incomplete, both territorially and occupationally, so that many disputes which as to subject matter, are within the normal jurisdiction of the labour courts must be tried in the ordinary courts. 18/

Given the fact that French unions are among those which have practically no machinery and no possibility to settle grievances at the plant level, it is not surprising that the case load of the French courts is very large indeed. McPherson and Meyers cite a case load of 50,000 annually. However, they add that the courts deal with them expeditiously and at a moderate cost to the parties. They also succeed in arriving at a voluntary settlement in a high proportion of disputes coming before them.

The Swedish Labour Court on the other hand has handled all in all 3,000 cases over a period of about 30 years. In fact the case load of the Swedish Court has declined almost year for year from a peak of 204 cases in 1932 to 39 cases in 1960. With the passing of the Public Service Collective Agreement Act of 1966 which extended the jurisdiction of the Court over the public sector, an increase could be expected. However, the experience with the 1936 legislation which led to the rapid unionization of clerical personnel and the large-scale introduction of collective bargaining in the white collar field,

has shown that the then expected increase in the number of cases which have been brought before the Swedish Court did not occur. This as well as the decline in the case load in general may well be ascribed to the fact that the restriction on its accessibility to organizations encouraged the organizations to bring before the Court cases mainly where clarification of the legal situation was desirable and, secondly, to the "educational" effect of the Court's decisions in teaching the organizations how to write their agreements within the requirements of the law.

An interesting fact about the Swedish Court is also that, while in the early years a fairly high percentage of all decisions were subject to reservations by members of the Court (usually on the part of the judges representing labour) in recent years unanimity of the Court was achieved in between 85 to 90 per cent of all cases.

The attitude of the trade union movement in the countries with labour court systems has not always been quite consistent. In Sweden and Denmark, for example, the Labour Court Acts were passed over the violent protest of the unions—strikes and mass demonstrations—and a Swedish wit is being quoted as having termed the Swedish Labour Court Act as a "Full Employment Act for Lawyers". Yet this original hostility evaporated surprisingly quickly, indeed gave way within a decade or so to unreserved praise.

A direct request for information on the attitude of the German Trade Union Federation (DGB) towards the German Labour Courts resulted in a characteristic answer:

> Concerning the attitude of the trade unions to the Labour Courts system, there exists no official pronouncement of the DGB. We can answer your question in that way we in principle favour the here existing institution of the Labour Courts comprised of professional as well as lay judges although we are not necessarily in agreement with all their decisions.

What seems to emerge is that "judgment by peers", in other words the mixed character of these courts, makes their decisions more acceptable to labour, even if unfavourable, because it is less subject to the taint of social bias which so easily is ascribed to ordinary courts in matters of industrial relations.

Conciliation, Mediation and Arbitration in Interest Disputes

Not in all countries is there as consequent and clear a distinction made between interest disputes and rights disputes as in Sweden: nor, as Johnston pointed out in the above quoted passage, can even a rights dispute always be resolved by reference to legal norms. Consequently in rights disputes the courts, especially the labour courts, will seek to mediate rather than render justice solely on the basis of legal norms and principles whether the law expressly prescribes such mediation function or not. Nevertheless legal norms, principles and precedents will play a certain role in the solution of all rights disputes.

Third-party intervention in interest disputes is a far more complex and contentious matter. While prevention of open conflicts remains a primary goal, public interest in the settlement shows many more facets, especially if it directly or indirectly affects large sections of the economy.

Conciliation has been defined in an International Labour Organization Report as "the friendly intervention by a neutral person in a dispute to help the parties to settle the differences peaceably". Mediation is a more active form of third-party intervention but not essentially different in kind. Arbitration provides for the determination of a dispute in terms prescribed by a third party. 19/

Conciliation-mediation are then part of the collective bargaining process itself. The question whether arbitration is an extension of conciliation, and how far it is to be regarded as a judicial procedure, is by no means as simple and finds different answers in various countries.

Practically all European countries have established some form of third-party intervention for the purpose of conciliation-mediation in interest disputes. In most countries, however, the machinery of conciliation and mediation is separate from that provided for arbitration. Conciliation and mediation are usually the task of professional government agencies while arbitration is more likely to be reserved to panels nominated by each side with an impartial chairman acceptable to both sides. Moreover, private and public machinery for settlement of interest disputes may exist side by side.

In Germany the so-called "Law 35" entitled Conciliation and Arbitration Procedures for Labour Disputes, promulgated in 1946, that is during the occupation period, is still in force. This Act of the occupation authorities definitely and consciously broke with the tradition of compulsory arbitration and has, as its primary aim, to enable the parties to agree on procedures of their own. Most of the Laender (provinces) have confined themselves to implement regulations under that law. Compulsory conciliation is provided for in two provincial acts but "the practical significance of these regional provisions is limited". 20/

Voluntary conciliation and arbitration procedures between the parties to collective agreements may show not inconsiderable variations between the Laender, but they follow in all essentials those recommended in a "Model Agreement" concluded in 1954 between the top management and union organizations.

This agreement foresees the establishment of conciliation and arbitration boards. Basic to this agreement is the provision that all agreed-upon procedures must be exhausted before any of the parties may take militant action. If no agreement is reached, a Conciliation and Arbitration Board must propose terms of settlement. The parties must declare within a specified period whether or not they accept the proposed settlement. Failure to do so within the prescribed period amounts to rejection of the award. In case of rejection by either party the conciliation and arbitration procedures are considered to have failed and the parties are free to take strike or lock-out action as the case may be.

A conciliation and arbitration board is made up of two or more members named by the parties, one of each side acting as the "senior representatives" of the parties who then may alternate as chairman. However, the appointment of an impartial chairman may also be agreed upon and this has become established practice.

Germany provides the example of a country where conciliation-mediation-arbitration may be one continuous process, but the element of arbitration is only involved in so far as a third party has to make an award without, however, binding the parties to the disputes to its acceptance.

It is interesting to note that what originally may have been intended as a bipartite system has evolved in practice into a tripartite one. If an impartial chairman is requested, the Minister of Labour will appoint labour court judges to settle disputes over new agreements, or, the same judges may be named directly by the parties. Also, the other members of the conciliation and arbitration boards are usually drawn from the same panels of names which are used in appointing the labour and management members of the labour courts.

> Thus, in both primary and secondary disputes, either formally or informally, the labour courts and labour court judges have a virtual monopoly on arbitration. 21/

Apart from the labour courts and labour court judges, there are conciliation officers in each Land (province) who can be used by the parties in connection with primary disputes, but they are only few in number and it is their main function to forward cases to arbitration in the sense of the word as used above.

> Once in arbitration nearly all cases are disposed of without dissent. This suggests that referral to arbitration, which is always tri-partite, often comes more from a desire to spread responsibility than from a true inability of the parties to reach agreement. 22/

In Sweden also, the mediation system occupies an important position in the bargaining process. The first Mediation Act was passed in 1906 but was replaced by a new Act in 1920. There are eight mediation districts, each with a government-appointed mediator. However, the geographic jurisdiction is flexible in that the mediator may operate outside his district for a specific branch of activity; for example, in the case of nation-wide agreements. Further flexibility is provided by the provision that the government can appoint mediators who may or may not be drawn from the ranks of the district mediators. The mediator can ask the parties to refrain from militant action while negotiations are in progress but cannot prohibit work stoppages.

However, the parties are obligated to give seven days notice of a stoppage of work to the other side as well as to the mediator by the so-called Warning Act of 1935. Another act of 1936 further strengthened the hand of the mediator in that the parties not only have a legal obligation to negotiate but also to present concrete proposals.

The Swedish mediation process is entirely voluntary and the Mediation Act only provides a framework for the mediation machinery which the parties and the mediator may adjust at their discretion to the particular circumstances. Here too an interesting practice has evolved in that the parties may agree on an impartial chairman already at the primary stage and one of the official mediators may then be asked to take the chair in the assumption that the same mediator will be employed if and when the negotiations pass into the conciliation-mediation stage.

There is little doubt that the flexibility of the mediation procedures and the wide powers of discretion of the mediators have proven the Swedish mediation system highly successful.

> The only principle which stands out as inviolable, and which is essential to the whole approach in Sweden to the settlement of industrial disputes, is that the mediator is not in any sense making awards or dispensing justice. He is not arbitrating, but conciliating. 23/

Compulsion, whether at the conciliation or arbitration stage, is equally abhorrent to Swedish management and labour. Typically, the argument against compulsory arbitration runs entirely on pragmatic lines. The unanimity of the views on the part of the unions and the employers in this matter is reflected in a statement on compulsory arbitration in interest disputes before the 1926 LO congress. There is nothing to indicate that the parties have changed their mind since:

> A law on compulsory arbitration in non-justiciable disputes must mean that the State takes upon itself the obligation to guarantee through its agency that the workers will enjoy the highest standard of living that the economic situation will allow at any one time, and that the employers obtain guarantees that wages will not be set higher than the general economic conditions prevailing will permit. The State cannot, however, give such a guarantee, since economic science can not yet serve as a satisfactory guide in judging these questions. Practical statistics are in addition far too

> inadequate to form the basis for a general judgement of these matters. Nor can the State give the workers a guarantee that employers will be willing to carry on their activity at the wage determined by arbitration, any more than it can guarantee that employers will be able to obtain workers at the wage determined. Thus the State seems to lack the prerequisites for being able to estimate what wages should be fixed at any one time, and for guaranteeing that business firms continue their activity at the wages fixed or that workers work for those wages. The employers' and workers' organizations are also in agreement in vigorously opposing legislation for compulsory arbitration of non-justiciable disputes. As far as private enterprise is concerned, therefore, SAF and LO are in complete agreement that compulsory arbitration in non-justiciable disputes is neither desirable nor appropriate. 24/

However, the turbulence of the Swedish labour scene in the twenties and early thirties led to the conviction that this freedom claimed by the labour market parties could only be maintained if the parties themselves could agree on procedures regulating their negotiations and on rules as to the type of militant action to be taken. These were embodied in the Basic Agreement of 1938 which in fact established a bipartite machinery for mediation and certain forms of arbitration. As pointed out earlier, there is nothing to prevent the parties using this machinery in wage disputes. Only one case is known where this has actually happened which shows the extreme care by both labour and management not to weaken the highly successful official mediation system.

The Norwegian and Danish approach to mediation-arbitration in interest disputes differs from that of Sweden and Germany in that it contains certain elements of statutory compulsion.

It is a characteristic feature of the Norwegian mediation system that the official mediator, while he must take the initiative to start mediation proceedings if requested by both parties, may also take this initiative on his own. If no agreement is being reached, he may put forward his own

proposals which the parties then have to vote upon. Failing agreement by this means, there is voluntary recourse by agreement to the National Wages Board. The institution of this Board was originally based upon an agreement reached between the Employers' Association and the Federation of Trade Unions during World War II—in fact, outside the country, in preparation for post-war reconstruction. Originally the Board had fairly strong powers to impose compulsory arbitration and this was quite readily accepted by the parties during the earlier post-war period. Subsequently, these powers were weakened in that recourse to the Board became voluntary. However, Parliament may impose compulsory arbitration by the Board "if a dispute, whether in the public or private sector, affects the vital interests of the nation". 25/

The Norwegian unions are in principle opposed to compulsory arbitration and will often accept a settlement to avoid a directive by Parliament. This happened in 1966 for example. However, the question may well be asked "how voluntary is voluntary" if the threat of compulsory arbitration imposed by Parliament hangs over the parties during their negotiations.

The Danish system may be briefly described as this: if the parties to a dispute at the national level have reached an impasse, the mediator has to be notified. If he becomes convinced that the parties have made no honest effort to reach agreement, he has the power to send them back to the negotiation table. If the mediator cannot find an acceptable compromise, a Mediation Board may decide whether or not the conflict would be contrary to the national interest. If the answer is negative, the strike can legally take place but if it is positive, another two weeks are given for further conciliation while the government prepares ad hoc legislation. Such ad hoc legislation has been resorted to with increasing frequency and recent developments in Denmark indicate a trend towards invoking the national interest in a widening area of

disputes. The conciliators enjoy a high prestige in Denmark. What troubles the industrial relations scene is not the mediation system as such but the readiness of government to resort to ad hoc legislation in the settlement of interest disputes.

In the Netherlands a very similar process seems to take place. During the early post-war years a private bipartite body, the "Foundation of Labour" became the forum for national collective bargaining, while within the framework of the wages and prices (incomes) policy, a government "Board of Mediators" became the wage control instrument. With the decline in the force of the original motivations that had inspired the "Foundation of Labour", the organizations composing this body found it increasingly difficult to justify themselves vis-à-vis their constituents and matters shifted gradually over to the tripartite Socio-Economic Council demonstrating, as in Germany, not so much an inability to reach agreement but rather a tendency towards spreading the responsibility. In addition, as it became more and more difficult to reconcile the wages, prices and employment goals, and government policies grew increasingly controversial, the pressures for a new bargaining system became irresistible. As a consequence, a new system was introduced at the end of 1967 which implied the discontinuation of overall national wage settlements in favour of a differentiation between the individual industrial sectors through free collective bargaining in each sector. The powers of the Board of Mediators were abolished, but only to be transferred to the Minister of Social Affairs assisted by a group of "wise men". Too little time has gone by to come to definite conclusion whether or not "freer collective bargaining will and can take place under the new system. However, developments during 1968 have already revealed certain weaknesses. While early settlements in some minor industrial sectors were permitted to break

through the government-established wage norms, the government resisted strongly when it came to a major sector. Strike threats and street demonstrations occurred with the final settlement being thrown into Parliament.

A general remark may be interjected here concerning the practical effects of the Norwegian, Danish and Dutch mediation systems as compared with Sweden or Germany. The first three grew largely out of the needs of post-war reconstruction. Government and parliamentary intervention in the bargaining process was tolerated for that reason. However, it was also tolerable for labour because labour was for long periods directly represented in government, and a certain trust existed that such governments would do their best to see that, in the reconciliation of economic goals, labour's interest would be protected. Shifts in political power have largely destroyed this trust and have thus shown up the dangers of the bargaining process if it is exposed to the vagaries of political decision making. Sweden's post-war reconstruction problems were relatively mild in comparison with that of countries whose normal governmental and industrial relations processes had been brutally interrupted by war and occupation. Despite the fact that a labour party has now been in power in Sweden for nearly four decades, the Swedish trade union movement has resisted the temptation of politicizing the bargaining process and in that repsect has never broken the common front with management. In Germany quite a different influence played a not inconsiderable role in leading to a liberalization of the bargaining process. As pointed out previously, "Law 35" on Conciliation and Arbitration originated with the occupation authorities reflecting strongly British and United States trade union views on the question of compulsion in the settlement of industrial disputes.

Belgium over the years has introduced various types of conciliation and mediation procedures and it is quite typical for the traditional Belgian

approach to industrial relations problems to be highly experimental and pragmatic in putting new systems into operation while letting older ones die a more or less natural death. The now-prevailing system rests largely on the function of Conciliators as ex-officio chairmen of the "Mixed Industry Commissions". However, depending on the extent and importance of a dispute, mediation has become in practice also a matter of governmental intervention by local town mayors, as well as ministers and even the Prime Minister, especially if the dispute has reached the stage of open conflict.

Austria and France may serve as examples of countries where the official mediation system has achieved relatively little importance although for very different reasons.

In Austria, the Collective Agreements Act of 1947 established the Provincial Mediation Boards and one Superior Mediation Board. The members of this Board are nominated by the "statutory" employer and employees' organizations. Among other duties, such as registration of collective agreements, etc., this Board acts upon the written request of both parties to a dispute to mediate and arbitrate. However, labour-management disputes are seldom brought before mediation boards since the employer and employee groups usually settle their differences without reference to third-parties or resort to work stoppages which, since the end of the war, has happened only rarely. 26/ This spirit of accommodation may well be regarded as a reaction to the situation approximating civil war during much of the twenties and up to the annexation by Hitler's Germany, but must also be seen against the background of the extraordinary degree of labour and management organization at the present time.

In France, on the other hand, lack of organization on the labour side in particular, and of any systematic approach to industrial relations in general, is also reflected in the relative ineffectiveness of official conciliation-mediation. Partly, the fault may also lie in the character of the French collective agreement:

> (Translation)
> There are few, if any, constraints on the parties...the collective agreement once concluded, is of practically indefinite duration.... Notification of termination is very rare. And in case that a contract of limited duration is not being renewed, the employer hesitates to re-affirm the benefits which the contract had granted to the employees. On the other hand, during the term of a collective agreement, it happens quite often that the unions make new demands and threaten strike action if they do not obtain satisfaction. There is nothing illegal about such a strike once the unions have respected the procedures of conciliation which may have been foreseen in the contract....
>
> Major conflicts are sometimes resolved thanks to the intervention of mediators but these are not always appointed in line with statutory procedure. The Superior Court of Arbitration has practically never been in session. 27/

The foregoing illustrates the great variety of approaches to the question of third-party intervention in interest disputes amongst the countries of continental Europe. Compulsory features where they still prevail seem primarily to be a carry-over from the post-war reconstruction period. This gives significance to the admonition of the Social Charter to promote voluntary settlement methods.

Disputes Settlement in Essential Services and Industries

There is hardly another area of industrial relations in which the public interest appears more directly and immediately involved than in the settlement of disputes in so-called essential services and industries. There is also hardly a country which at one time or another and, in one way or another, did not have to come to grips with this issue.

Several general observations may be made in this context. First: in advanced industrial societies in which the service industries, whether public or private, take on a seemingly ever-increasing importance in the economy, and the interdependency of production and services is becoming more and more pronounced, the old concept of "essential" as referring primarily to matters of health, personal safety, protection of life and property and national security, is no longer sufficient. Second: with the increase in the role of government in the economy, both as to the variety of services to be provided as well as to the number of employees involved, the issue of essential services becomes more closely than ever interwoven with the question of bargaining and strike rights and methods of settlement of disputes in the public services. Third: the trend towards approximation of the industrial relations system in the public service to that prevailing in the private sector, which is a phenomenon of all industrially advanced countries, gives the question of how to deal with disputes in essential services increasing prominence as well as complicating it. Fourth: the emergence of a quasi-collective bargaining relationship between ostensibly self-employed groups and public and private institutions, where discontinuation of services has an immediate and direct effect on large sections of the public, presents the question of essential services with a further new dimension.

Historically, the main difficulty in dealing with this issue has been that of finding an acceptable definition of what is "essential" and what is not, at what stage does an "inconvenience" to the public become a danger to the community; in other words, to what degree is public interest actually becoming involved in any of the disputes which may arise.

Sweden is one of the countries where, already in the thirties, the public became particularly exercised in this matter. It became a central theme

in the negotiations between the Swedish Employers' and the Swedish Trade Union Federations leading to the 1938 Basic Agreement. The issue has never been more clearly stated or the logical conclusion as effectively drawn than in the Report of their Negotiating Committee which then became the Preamble to the Agreement:

> (Translation)
> When considering the question of labour conflicts which imperil the public interest, the Committee sought to judge the need for special measures to prevent activities from being disturbed that provide the people with essential utilities, social care and the like. Public discussion in this matter has been very much divided on how best to define and restrict those fields of activity which considering their special public importance, should be protected against industrial conflicts. The Committee is of the opinion that no approximate demarcation of such fields could be defined which could claim both objectivity and general recognition. The very fact that the public interest is always dependent on the scope of a prevailing labour conflict makes such a predetermined demarcation impossible. A certain activity is rarely in itself of such fundamental importance to the community as to warrant its protection against any conflict. On the other hand, a conflict which in itself is by no means directed against any essential public function, may yet by its very existence to some limited extent impair or even prevent services which are essential for providing the general public with safety of life and health. Consequently, since the need of avoiding or limiting a particular conflict is directly dependent on the circumstances of each case, no other solution appears to offer itself than that of the balancing of conflicting interests to assert itself in each individual conflict, with due regard also to the interests of society as a whole.

Within certain limits, partly also due to the differentiations in the legal status for civil servants and public employees in a number of European countries, the difficulty of defining essential services has led quite generally away from singling out specific types of services and specific categories of employees as essential *per se*, but instead is leading towards the establishment of *ad hoc* procedures which can take into consideration the timing, duration, scope and other circumstances surrounding each individual conflict.

In Sweden, the "due regard" concept established by the above-quoted passage in the Preamble to the Basic Agreement, then gave also cause to the famous Section V according to which the contracting parties:

> (Translation)
> ...shall jointly take up for prompt consideration any conflict situation where protection of any public interest is called for by either of the two organizations or by a public authority or by any other similar body representing the public interest in question.

The joint machinery established to make the ad hoc decisions whether or not a specific dispute may be against the public interest, is the bipartite Labour Market Council whose private character has to be emphasized. Perhaps the most unusual feature of Section V (unusual also for Sweden) is that even bodies which are not part of the Agreement may raise the issue of the public interest with the bipartite Labour Market Council.

The enforcement of the Council's decisions rests solely with the contracting organizations which are indeed well equipped for that purpose by the powers conferred upon them in their constitutions and by-laws, quite apart from the moral force which would be brought against any offending party. The number of cases in which Section V of the Basic Agreement had to be involved has been exceedingly small (only about three have come to public knowledge within three decades) and only one ever reached the decision stage. The very existence of the agreement and of the joint machinery has apparently been sufficient to enforce settlements at the primary levels.

Following the passing of the State Employees' Act of 1966, which extended the existing labour legislation and thus the right to collective bargaining and the right to strike to all public employees, an agreement was concluded between the negotiating agency of the government as employer and the recognized main organizations of the public employees which to all intents and purposes parallels Section V of the Basic Agreement.

The Agreement provides for the establishment of an appeals organ similar to the Labour Market Council called the State Service Council (statstjänstenämnden) consisting of eight members, four acting for the employing authorities and four (one from each of the signatory organizations) on the employees' side. The Chairman and Vice-Chairman are elected from within this Council.

According to Article 2 of the Agreement, it is the purpose of this body to prevent "socially dangerous conflicts" and its tasks are defined in Articles 16-18 as follows:

(Translation)
Article 16

If a party believes that a dispute may unduly disturb important social functions, it may demand that negotiations take place between the parties for the purpose of avoiding, limiting or settling of disputes. If a party refuses to enter into negotiations, or if no agreement can be reached, the question shall be referred to the State Service Council for investigating whether or not the dispute is of the above mentioned kind.

Article 17

If the question concerning the socially dangerous character of the dispute has been referred to the State Service Council, any envisaged coercive action which has as yet not taken effect, shall be postponed until the Council has reached a decision.

If such a decision has not been forthcoming from the Council within two weeks from the date at which the dispute was reported to the Council, the party is free to start coercive action provided that the Council has not ordered a postponement for reasons of more time for deliberations. If such an order has been forthcoming, the parties are not obliged to postpone action longer than three weeks from the date the question has been referred to the Council.

Acticle 18

The Council decides only by full attendance. Its decisions are reached by a majority vote.

The parties to the dispute are to be informed, by the Chairman, of the decisions of the Council. Should the Council have found the dispute to be of a kind as described in Article 16 (i.e., of a socially dangerous kind), the Council shall recommend to those concerned that they avoid, limit or settle the conflict.

Just as in the case of the 1938 Basic Agreement between the LO and the SAF, no sanctions are found necessary. It is clear—and experience has demonstrated this—that the moral and organizational authority of the contracting organizations is regarded as sufficient to bring about a settlement, as no organization will care to carry the stigma of being condemned by its peers for having entered into a "socially dangerous" dispute.

Again the purely bipartite character of the Swedish agreement machinery should be stressed, the government being a party to it but solely in its function as an employer. Obviously Parliament has always the power of entering a dispute by ad hoc legislation but it is being assumed that if such legislation should ever be deemed necessary Parliament would not act before the mediation machinery was exhausted and the Council had the opportunity to condemn the dispute as "socially dangerous".

Moreover, historical evidence suggests the utmost caution prevailing in Sweden in approaching the kind of dispute that would be declared socially dangerous. For example, a dispute which in 1953 closed down for five weeks the whole food processing industry, with the exception of the co-operative enterprises, was not deemed by the Labour Market Council as endangering essential services. 28/ Similarly, the 1966 teachers strike which paralyzed for several weeks the secondary and tertiary school systems was not even brought before the State Service Council, the argument being that if an interruption of school attendance for a limited number of weeks could be termed "socially dangerous", there was practically no industrial dispute which could not be termed equally so.

Germany too can be said to deal with the question of essential services as a problem for ad hoc decision. However, here there are certain legal

concepts which affect the issue, such as the concept of the dispute "contrary to public morals" and in particular the concept that the aims of the dispute must be proportionate to the means employed and the advantages that may accrue from it.

According to an official commentary:

> The choice of the point in time at which the dispute is started may...be regarded as being contrary to public morals. It is true that it is legitimate to wait for a particularly advantageous time to start a dispute, even if such choice may seriously inconvenience the opponent. However,...if the public interest is seriously affected, the dispute is regarded as illegal, as being in contravention of public morals. This could be the case, for instance, if a strike by farm labourers at harvest time seriously jeopardized the public food supply by reason of its extent and duration.
>
> ...an industrial dispute is in general and particular contrary to public morals if the losses caused by a dispute which is in itself permissible, do not stand in a reasonable relationship to any advantage which may accrue from it. This may be especially true in regard to labour disputes in vital establishments (e.g., hospitals, public utilities or public transport services) particularly if the leaders of the dispute fail in the maintenance of essential services. 29/

It seems indeed as if German law consciously goes out to make the decision if and when a permissible conflict becomes non-permissible as uncertain and as open to subjective interpretation as possible. Indeed, as the above commentary points out further:

> The organization of workers and employers, or the individual employer, are under a moral obligation to consider conscientiously, before the commencement of a dispute, whether or not the object of the dispute justifies the employment of the projected methods.

It will also have been noted that German law takes it practically for granted that in the case of "vital installations", such as hospitals, public utilities, etc., emergency services will be maintained and that neglecting to make such arrangements will put a dispute ipso facto in the "contrary to public morals" column.

Even in countries where the law is far less stringent than in Germany or where it has little or nothing to say in matters of industrial disputes, there is a strong tradition, either by standing agreement or by ad hoc arrangements, to safeguard certain emergency services. Belgium is one country which, while otherwise highly permissive in industrial disputes or possibly because of this permissiveness, has attempted to deal with the question of essential supplies and services by statute. The aim of this Belgian legislation which dates from 1948 and was later amended on several occasions, is not to make a strike as such illegal but only to safeguard vital needs and to protect industrial equipment and materials against deterioration. Such safeguards are to be established by agreements to be reached in the Mixed Commissions which have to decide for their own industrial sectors if they are necessary and what kind of supplies and services are to be maintained. Details are to be left to plant-level arrangement. As an exception to the general rule governing the voting within the Mixed Commissions that decisions have to be unanimous, agreements on emergency measures may be reached by a majority vote of three quarters on each side. Once these agreements are reached, they then may be approved by Order-in-Council in which case they become binding and failure to observe them entails criminal responsibility. The legislation goes into considerable detail as to the industrial sectors and services to be covered. However, it has been rather difficult to ascertain to what extent the commissions could reach agreements and even more so as to their effectiveness. Some of the commissions did what was expected of them, but in others no agreement was possible because of unbending opposition. Other agreements covered sectors where there were no supplies or services essential to the public, and in other cases again the scope of the agreements was too limited to be of practical use. On the whole, the impression must be gained that the practical results of the legislation have been disappointing.

While the question of essential services is by no means limited to the public sector and relates to the nature of the services independent of whether the employer is private or government, nevertheless many of the services whose interruption immediately affects broader population groups are in the public domain. It is, therefore, one of the issues, but only one, which are affected by the concepts prevailing in each country concerning the bargaining rights, the right to strike and the disputes settlement methods in the public services.

Government as Employer

In a lecture before the 1961 Congress of the Public Service International (PSI), an organization which includes most of Europe's major public service unions, Professor Folke Schmidt stated:

> To most people the idea of collective negotiations as an established institution is associated with the private labour market. Employers or employers' associations and unions of workers meet and bargain with the aim of making rules on wages, piece rates, salaries and increments, on hours of work, security of employment and other employment relations. These rules are laid down in collective agreements which are private-law contracts between the parties.
>
> In the public services other patterns have prevailed. The employee does not necessarily take the position of a party of private-law, rather he is considered subject to unilateral regulations by way of statutory enactments. However, there is a tendency towards an assimilation of the public services with the private labour market. The idea that employment relations have to be governed between the parties on footings of equality has gained ground in several countries.

Since this statement was made at the beginning of this decade, the process of assimilation has, if anything, accelerated, viz: the Swedish State Employees Act of 1965 which in one stroke extended all labour legislations to public employees and, among others, the Canadian Act respecting Employer

and Employee Relations in the Public Service of 1967, as well as similar provincial acts or, in the United States, the Federal Executive Order 10988 of 1962.

Nevertheless there exists in continental Europe still an institution which, however much of an anachronism and ill suited to the conditions of a modern industrial society it may appear, survives and impedes the process of assimilation of the employer-employee relationship in the public services to that existing in the private sector—the so-called "established civil service". Under this concept which originated in the absolute monarchies of the 18th century 30/ and for which there is no equivalent in the English-speaking world, the civil servant stands in a particular relationship to the "state" (previously the monarch and now the sovereign people represented in parliament) which is not based on contract but on specific statute. This binds the civil servant to absolute fealty and, as in Germany, not only prescribes rules of behaviour for his official life but may even extend into his extra-official private life. In return, the "established civil servant" enjoys a number of privileges, perhaps the most important and distinguishing being the absolute tenure of office from which he can only be removed by court action. It should be noted that this privileged status has nothing whatever to do with the position a civil servant holds in the hierarchy of public service. It encompasses the humblest as well as the most senior members.

This survival of the concept of a particular relationship between the public servant and the sovereign state has created quite a series of anomalies. For example, the status of the "established civil servant" does in no way infringe on his civil rights. Not only does he preserve the right of association but he is fully entitled to belong to a political party, be

politically active and be elected to political office. Apparently, the "fealty" which he owes the state does not extend to the government in office as legally it is not the government but the sovereign people which is his employer.

On the other hand, in the employer-employee relationship as such the concept of the particular relationship in which the civil servant stands to this sovereign as his employer does bear on his negotiation rights, methods of dispute settlement, and in some countries puts the right to take collective action into question.

Moreover, there have grown up beside the civil service category proper other groups of public servants: the salaried employees whose services may be dispensed with and the hourly-weekly paid worker. And, to complicate matters further, the legal and administrative status of state enterprises may vary greatly both within and between countries. They may be part of the ordinary government administration or they may be the equivalent of our crown corporations or, they may be run under special statute as "nationalized industries". Thus, with the expansion of the public service beyond its traditional area and the growth of the public sector into directions where legal ownership rather than function distinguishes it from private enterprise, two and sometimes three broad categories of public service emerge whereby, generally speaking, the non-established public service is subject to one set of legal provisions, those governing the private sector (contract) and another which operates under other, specially established rules (statute).

Nevertheless, even the legislative process of establishing wages and working conditions takes on more and more the features of collective bargaining and the original unilateral determination by the sovereign state is

becoming something of a legal fiction, even if the agreements reached between the public service unions and the representatives of the state have to take the form of a statute rather than of a contract.

Undoubtedly, one of the main reasons for the continuing assimilation of employment conditions in the public services to those prevailing in the private is the evolution of the economy. As Professor Marc Sommerhausen, a Belgian authority on public service employment points out:

> Originally, civil servants were a small and privileged minority within the nation. This minority accepted special rules and submitted to strict discipline, because it enjoyed material advantages and social prestige. Public employees had stable employment in a society in which unemployment was a constant threat to workers and employees in private enterprise. Public employees retired with a pension whilst workers and employees had to rely on their savings when age compelled them to stop remunerative occupations and if they had been unable to save, they had to ask support from their children or from public charity. Public servants often wore a uniform and were better dressed than people who had to buy their own clothing. Even the modest street sweeper wore a sort of military cap which showed that in spite of his menial job he belonged to a different sort of people than those who had the same skill but worked in private employment. 31/

Today, in contrast, greater job security and the extension of fringe and social security benefits to the labour force in general, as well as the income benefits derived from tighter conditions on the labour market, all have contributed to minimizing the employment advantages of the public service and maximized the disadvantages, especially as these often come to the fore in wage and salary determination.

If, nevertheless, in the countries of continental Europe the special status of the established civil servant is being maintained and even defended by civil service unions despite its infringements on negotiation procedures and other rights of collective action, the reason usually forwarded is that century old traditions die hard. Moreover, in European societies

in which there still is a good deal of social stratification and immobility, the "fonctionnaire" or "Beamte" as the established civil servants are called in French and, respectively, German-speaking countries, still enjoy—at least in their own eyes—a social "status" which, however humble the position, singles them out even if the work and pay is no different from any in private employment or even in public employment which is not part of the establishment.

It would be beyond the purpose of our study to go into the details of how in each country the quasi-collective bargaining process which characterizes the transitory stage from unilateral determination of wages and working conditions to real bargaining takes place. The usual way seems to be joint negotiations-consultations for the whole civil service, often between standing committees on both sides or for specific departments or services between the respective union and unions with departmental officials. However, the actual powers of such committees may vary greatly from country to country reflecting the state of union organization and acceptance of collective bargaining in society in general. There is little doubt about the power and influence of these committees in countries like Austria, Denmark, Norway, Germany, Switzerland, etc., in contrast to the lack of power of such an institution as the Central Civil Service Committee in France which is purely "advisory", especially in matters of wages and salaries.

A further anomaly in the employment relationship in many European countries as far as the civil service is concerned, derives from the concept of the state as the "sovereign" employer. From this the conclusion is being drawn that it excludes any third-party intervention and thus pre-supposes the absence of formal conciliation-mediation-arbitration procedures. This is the case in Austria, Denmark, France, Germany and Switzerland while Norway and

Sweden are exceptions. 32/ However, apart from such possibilities as provided by the Austrian constitution which makes in practice act the federal government as "mediator" in provincial disputes and the provincial authorities in the case of disputes at the municipal level, the concept of the legislature as representing the "sovereign people" as employer permits the civil service unions to meet directly with the corresponding committees of Parliament and legislatures and thus the emergence of what may well be called civil service lobbies. Switzerland, which still maintains strong remnants of direct democracy, provides a further possibility which, however, must be a rather double-edged sword as far as the civil service unions are concerned: the decision of the legislature is final only if there is no appeal, in which case it would be subject to a referendum by the electorate.

Once again it should be stressed that all the above applies to the "established civil service" only. In countries where this is not the exclusive public service category, most other categories are usually subject to the normal laws governing conciliation-mediation-arbitration. Some exceptions may be found though, either way. In Germany, the Postal Administration Act of 1953 specifically prescribes that salaries, wages and working conditions have to be established "in collective agreements to be concluded with the appropriate unions". However, the same Act also requires the consent of the Minister of Finance and the Minister of the Interior to the conclusion of an agreement "if, because of its bearing on questions of principle, it is apt to influence the development of wages and working conditions". This puts the ministers into the role of quasi-arbitrators and according to a trade union statement, "has been the object of unending controversies between the German Postal Workers' Union and the Federal Postal Ministry". 33/ On the other hand, in contrast to the practically unilateral determination of wages and

working conditions in the French Civil Service, the French Act governing the nationalized industries does prescribe collective bargaining as the normal procedure. However—to take the nationalized gas and electricity undertakings as examples—it is the competent minister who has to act as the arbitrator in the case of disputes. Once again to quote a trade union source:

> Now political contingencies have led to a position in which questions of remuneration are hardly ever discussed between the general managers and the unions but are subject to Government initiative and Government decisions, based largely or completely on considerations which have no bearing on the running of the undertaking. The result is that in the unions there is neither negotiation nor arbitration. The Government acts as an absolute authority, deprives the general managers of their role as employers and converts them into executants of political decisions. At one blow it also deprives the unions of the normal means of defending the economic interests of their members. 34/

Both the above quoted German as well as the French case, point to a serious problem in matters of arbitration of disputes in the public services:

> Arbitrators tend to regard "fair comparisons" or a "fair wage" as the dominant principle to which they must adhere. If the state is content to allow public servants' wages and conditions to follow the general industrial pattern it can afford to allow its sovereignty control to be delegated in this respect. Where, however, the state wishes to use its position as employer to set a new pattern of remuneration, or where the public service assumes the dominant position in a given society and thus inevitably becomes the pace-setter, new problems arise.
>
> If public ownership and similar forms of direct public control expand much further, wages and conditions in the public sector will no longer be able to follow those in private industry. Arbitration is then likely to become redundant. The government will itself have to face the task of negotiating with the unions as a whole, the conditions on which people shall be employed. (H.A. Turner, Arbitration). 35/

The Right to Strike in the Public Services

The public service area provides the ideal proof for Kahn-Freund's above-quoted observation that there is no correlation between the interest shown by the law on the subject of strikes and their actual incidence.

Austria and Belgium are examples of countries where the strike is legally neither forbidden nor allowed, nor do they make any distinction between various categories of public employees in that respect. Yet in Austria there have been over the last quarter of a century only a few minor incidents involving public service strikes. They have been far more frequent in Belgium which indeed experienced at the turn of 1961-62 a public service conflict which, when other services joined in, nearly amounted to a general strike. The evolution of thought in regard to public service strikes in Belgium has been rather that of a change in attitudes than of any particular legal doctrine. Whereas in the twenties the government still held that "officials holding posts of authority" have no right to strike and recognized that right for "administrative agents", only several decades later, the government declared that the status of the personnel had no influence on the right to strike.

In Norway, civil servants as well as other categories of public servants are subject to the Labour Disputes Act which does not explicitly stipulate the right to strike but contains several provisions mentioning strike action. In the opinion of the unions, this implies a universal right to strike. As in the case of the private sector, government may impose compulsory arbitration. In recent years there were several major disputes between the government and public employees. Each, though, was settled by compromise before either emergency legislation or arbitration had to take effect.

In the Netherlands, according to available information at present, the provisions of the Penal Code which forbid the strike by public servants and even extends this prohibition to manual workers in public employment is still in force. However, the law of strikes in that country is in general rather cloudy and its revision is under consideration.

Danish literature seems to ignore the subject, but there has been no public service strike in over fifty years which makes this topic appear less than urgent.

Sweden has, as pointed out before, simply extended all legislation affecting the private sector to the public sector which makes the right to strike a universal right with practically no exception as to function or status.

The Act contains a kind of "management rights" clause (inserted against judicial advice holding that such a clause should also be open to negotiation) which makes the rules governing organization and administration of the services exempt from collective bargaining although not from consultation. This has created some difficulties, and the borderline between the negotiation and consultation process is rather blurred. The fact that the legislation explicitly exempts matters of administration and organization from negotiation would make a dispute subject to Labour Court decision but would call into question the legality of any open conflict in such matters. Complementary to the legislation is then also the Agreement concerning the machinery to restrict, prevent or solve "socially dangerous disputes". Public service disputes have occurred very seldom. However, it is noteworthy that the only major conflict, that of the "teacher strike" in 1966, occurred in a public service area involving a relatively newly organized group of professional workers. Lack of experience on all sides has been given as one of the reasons for this incident.

The question of the right to strike in the public services in France has been for long a "grey area" of French jurisprudence. However, in 1963 the government did in fact enact legislation "concerning certain aspects of the right to strike in public services" to apply to the civilian employees

of the state, its regional subdivision, and municipalities over 10,000 inhabitants, as well as to personnel in public and private enterprises under public control. It forbids strikes without warning and rotating strikes. However, the significance of this legislation has been found to lie less in the restrictions it imposes than in the indirect confirmation of the right to strike by attempting to regulate it. Since there are no other statutory provisions concerning the right to strike in the public service it has been accepted by the courts that the government or individual ministers have the right to prohibit the exercise of this right by individuals and groups in accordance with their vital functions and the degree of their authority. This is an administrative procedure only and therefore open to appeal to the Conseil d'Etat.

France has been plagued by strikes in the public sector rather more than in private enterprise, but (the May 1968 events apart) these have been, in the largest number of cases, of short duration, usually not more than 24 hours. This is a peculiar characteristic of French union tactics and has been explained in this way:

> Because of lack of finances, the unions generally prefer strikes of brief duration, repeated at close intervals, to prolonged strikes. The strikes of brief duration are part of the negotiation process, rather than its conclusions. 36/

In Germany it is being held that the right to strike and lockout in the public services in principle corresponds to the laws pertaining in the private sector. However, the majority view among lawyers appears to be that the right to strike does not extend to the "established" civil servants, not only because of their particular status but also because the strike is legal only for the adjustment of conditions of employment and must be directed against the employer. As it is not the government that is the employer but the

sovereign people in Parliament, a civil service strike is not permissible. The right to strike on the part of manual workers in the public service is, however, generally recognized. In the case of the non-established officials, the official literature declares it a disputed question, while the trade union literature leaves no doubt as to their right to strike.

Public service disputes have been exceedingly rare also in Germany, although threats of strikes have been made with greater frequency. A strike vote amongst postal employees in 1967 brought the matter very close to an open conflict but the threat was sufficient to ensure a compromise acceptable to the union. 37/

Swiss law again provides that persons in the employment of the federal authorities are prohibited from belonging to organizations which envisage strike or resort to it. In most cantons and municipalities, strikes are not prohibited. Neither prohibition nor the absence of machinery for the settlement of disputes in the public services appears at present a matter of major concern since there has been no strike in the public service for many years. The unions, though, aim at the elimination of strike prohibition of federal employment as a matter of principle.

If, with the exception of France, Italy and periodically Belgium, open conflict in the public services has been a rare occurrence in most European countries for many years, this may be ascribed to several factors. First, the low incidence of industrial conflict in general; second, the existence in most countries of strong and well organized unions in the public service with long experience in the techniques of consultation and negotiation: third, the equivalent experience on the employer's side as well; fourth, the efficiency and respect enjoyed by the mediation services in countries where

they are provided; fifth, the traditional attitudes of large parts of the civil service averse to strike action coupled with the practical consideration that civil service strikes, especially in many of the purely administrative areas of the services, are not the most effective way of settling differences; sixth, that a strike in services which directly affect the public is a coercive weapon to be used sparingly and with the consent of the trade union movement as a whole rather than by independent action; last but not least, the existence in many of the countries of a machinery of countering difficulties preventatively at the departmental or plant level by representative bodies, joint or otherwise, which permit a continuous dialogue between the administration and the public employees.

NOTES AND REFERENCES

1/ Kahn-Freund, in "Labour Relations and the Law", a Comparative Study, edited and with an Introduction by Otto Kahn-Freund, Stevens and Sons, London, 1965, p. 9.

2/ Gunnar Myrdal in "Beyond the Welfare State", (Bantam Books, 1967, p. 51) ascribes the lack of resistance of France to radical movements whether of the Left or of the Right, to the centralization of government which, persisting through successive waves of regime changes, has prevented the growth of regional and local self-government as well as of an "infra-structure of democratically balanced interest groups". This renders France very different from the other countries of Western Europe.

3/ Economic Council of Canada, Fifth Annual Review, Ottawa, Queen's Printer, 1968, p. 9.

4/ In this context reference may also be made to the remark by E.F. Denison in "Why Growth Rates Differ", The Brookings Institution, Washington, D.C., 1967, p. 365:

> Timeloss as a result of industrial disputes was less than 0.1 of available time in the United States. It is known to be negligible except in rare instances, in all other countries.

Loss of time in Canada through industrial disputes has been varying between 0.1 and 0.25 per cent of worked time, per annum. Information concerning numbers of disputes, workers involved and working days lost is usually derived from the ILO Year Book of Labour Statistics. This shows the fluctuations in the incidence of open industrial conflict for each country but is unsuitable for international comparisons as the statistical base varies greatly between countries.

5/ Kahn-Freund, op. cit., p. 15.

6/ Gino Guingi "The Right to Strike and Lockout under Italian Law", in Kahn-Freund, op. cit., pp. 211-12.

7/ See André Brun "The Law of Strikes and Lockouts in France", in Kahn-Freund, op. cit., pp. 193-96.

8/ Hans Reichel and Hanns Zschocher: "Conciliation and Arbitration and the Law as applied to Labour Disputes", Federal Ministry of Labour and the Social Structure, Bonn Monograph Nr. 20, 1963, pp. 10-11.

9/ Thilo Ramm, "The Restriction of the Freedom to Strike in the Federal Republic of Germany", in Kahn-Freund, op. cit., p. 210.

10/ André Lagasse, "The Law of Strikes and Lockouts", in Kahn-Freund, op. cit., p. 179.

11/ On the above, Alexandre Berenstein, "Industrial Disputes in Switzerland" in Kahn-Freund, op. cit., pp. 220-23.

12/ For the following see T.L. Johnston, "Collective Bargaining Law in Sweden: A Study of the Labour Market and its Institutions", London, 1962, George Allen and Univen, especially Chapter VIII, pp. 176-81.

13/ T.L. Johnston, op. cit., pp. 138-39.

14/ For this and the following, the author is largely indebted to the introductory and concluding sections of W.H. McPherson and F. Meyers "The French Labour Courts: Judgement by Peers", Institute of Labor and Industrial Relations, University of Illinois, 1966. In the course of their study, these authors noted that critical and comprehensive evaluations of the role of the Labour Courts in industrial relations were extremely scarce even in the individual countries. For Sweden, where the Labour Court has taken on very distinct characteristics as to jurisdiction and accessibility, the main source remains T.L. Johnston, op. cit.

15/ W.H. McPherson and F. Mevers, op. cit., p. 2.

16/ See Clark Kerr, "Collective Bargaining in Post-War Germany", in A. Sturmthal, "Contemporary Collective Bargaining in Seven Countries", Cornell University, Ithaca, New York, pp. 194-97.

17/ Ibid., pp. 195-96.

18/ McPherson and Mevers, op. cit., pp. 84-85.

19/ H.D. Hughes, "The Settlement of Collective Disputes in the Public Service". Report to the XVIII Congress of the Public Service International, 1967, Document 18C-7, p. 15; also in "The Civil Service Review", The Public Service Alliance of Canada, June 1968, Vol. XLI, No. 2, pp. 8-28.

20/ Reichel and Zschocher, op. cit., pp. 3-5.

21/ Clark Kerr, op. cit., pp. 194-95.

22/ Ibid., p. 195.

23/ T.L. Johnston, op. cit., p. 142.

24/ Quoted by T.L. Johnston, op. cit., p. 143.

25/ C.D. Hughes, op. cit., p. 7; also J. Inman, "Trade Unionism and Wage Policy in Norway Since the War", in A. Sturmthal, op. cit., p. 57. It is noteworthy, though, that in advance of the 1968 negotiation round the Norwegian government declared that it would not make use of its powers to invoke compulsory arbitration.

26/ United States Department of Labor, "Labor Law and Practice in Austria", BLS Report 241, 1963, p. 23.

27/ Jean Savatier, Revue Internationale de Droit Comparé, pp. 58-59.

28/ T.L. Johnston, op. cit., p. 187.

29/ Reichel and Zschocher, op. cit., p. 13.

30/ Folke Schmidt, "Kollectiv Arbetsrätt", Stockholm, 1967, p. 9. The usually quoted "pattern-setter" is the Prussian Civil Service Code of 1794.

31/ Marc Sommerhausen, Lecture at 17th PSI Congress, 1964, in PSI Documentation, op. cit., pp. 38-39.

32/ In Norway the normal conciliation-arbitration procedures apply to all public servants, with one difference, however, in that the government when requesting the National Wages Board to impose compulsory arbitration would have to obtain parliamentary permission. Since 1966 Sweden has simply extended the jurisdiction of the Labour Courts in matters of rights disputes and of the mediators in matters of interest disputes to include the public service. It has hitherto maintained the institution of an "established" civil service but abolished all legal consequences as far as collective bargaining and collective action rights are concerned.

33/ Proceedings of the 7th European Conference of the Postal, Telegraph and Telephone International (P.T.T.I.), 1967, Doc. 7 EUR/3 (a).

34/ PSI Documentation, op. cit., p. 71.

35/ H.D. Hughes, op. cit., pp. 18-19.

36/ Jean Savatier, op. cit., p. 88.

37/ Thilo Ramm, "The Restriction of the Freedom to Strike in the Federal Republic of Germany", "Labour Relations and the Law", in Kahn-Freund, p. 204, doubts whether the distinction between established and non-established civil service would actually prevent the former from participation in a strike by their colleagues who are mere employees, but adds:

> It is however, interesting to note that in branches of the administration which employ large numbers of 'officials', e.g., the railways and postal services, the trade unions do not proclaim strikes at all, not even of mere private employees, but rather resort to 'working-to-rule' or 'go-slow'.

CHAPTER V

SOME CONTEMPORARY PROBLEM AREAS

Labour Force Representation: Participation, Consultation and Co-Determination

The demand for a participatory society is universal. However, we are concerned here with this issue only in so far as the claim of the labour force to participate in shaping its economic and social environment specifically affects industrial relations systems. This is by no means a new issue. In fact it is as old as the labour movement itself. As a German trade unionist pointed out: every collective agreement is, as such, an expression of co-determination. In other words, the participation process starts as soon as the determination of wages and working conditions changes from unilateral decisions into contracts between, legally at least, equal parties.

Ever since the end of World War II a good deal of institutional experimentation has gone on in practically all European countries to create a system of industrial organization involving both management and labour in pyramidal structures reaching from the enterprise to the national level. Already the German constitution of 1919 foresaw an "Economic Council" as a kind of parliament of industry and labour which, however, proved to be a premature and unlucky experiment. Belgium and Holland saw experiments in industrial organization especially during the thirties. In 1919, Austria, which has a long

history of industrial structuring, added to the existing "Chambers" of industry, commerce and agriculture, that of labour, as elective bodies based in law. Sweden began its system of joint labour-management bodies in the late thirties.

It was, however, the post-World-War-II period with its need for rebuilding war shattered economies which saw the spread and flowering of these institutions, especially at the national level. In the introductory section of this study, we noted as perhaps the most significant and constructive trend in European industrial relations systems the attempts made to bring the employer-employee relationship and in particular collective bargaining under the umbrella of predetermined economic and social policies by means of institutions which are partly consultative in relation to government and partly decision-making bodies in their own right.

We also noted that once post-war reconstruction had declined as the motivating force, the acceptance of that set of economic and social goals which is now common to all countries of the industrial west, above all full employment and price stability, required elements of economic planning which for a consistent and simultaneous achievement had to be based upon a modicum of consensus between organized interest groups. Preoccupation with the employment and price goal is in some instances even quite clearly expressed in the names of this institution. Austria has its "Joint Commission on Price and Wage Questions" assisted by an expert sub-committee, the "Advisory Council on Economic and Social Questions"; Belgium a "Central Economic Council" a "Labour Council" and a "Prices Commission" apart from the "Mixed Industry Commission"; France, the "Economic and Social Council" prescribed in the constitution and of particular importance as the consultative organ in relation to the "Plan"; the Netherlands, the "Foundation of Labour" and the "Economic

and Social Council" and Switzerland, the "Commission for Business Cycle Questions".

The absence of two countries in this list may be noted: Germany and Sweden.

The institution of a "Federal Economic Council" with subordinated regional bodies has been a long-standing demand of the German trade unions but is also supported by some employer organizations. Such a Council was to be the pyramidal point of an economic organization which was to compliment the already highly developed system of consultation and co-determination at the enterprise level. The objections against the creation of a participatory body at the national and/or regional levels have been twofold; first, the unlucky experiment of the Weimar Republic: and second, and more significantly, the alleged dangers to parliamentary democracy in a country in which large powers are already vested in strongly organized interest groups.

> (Translation)
> In this case (the creation of an Economic Council), the interest organization would constitute themselves as political "estates" and replace the political parties. The party-state would become a corporate state...it would deprive the state of its function as guarantor of the common weal and deliver the citizens as a whole into the hands of the special interests of the corporate bodies established as political forces. 1/

The lack of importance given to a national participatory body on economic and social matters in Sweden may be surprising in view of the highly centralistic character of the Swedish state. Nevertheless, Sweden is not only one of the most highly organized societies in that practically every aspect of political, economic, social and cultural life is centred on organized groups, but also one of the most participatory ones. And this largely is due to its unique system of public administration, an aspect often overlooked by

foreign observers of the Swedish industrial relations scene. Yet the whole development of Swedish industrial relations cannot be fully appreciated unless it is recognized that organized management and labour is not only associated in a bilateral relationship but at the same time represented in numerous "agencies" which are the backbone of public administration. In Sweden, the functions which in other countries are wholly fulfilled by ministries or departments of government are divided between ministries whose functions are primarily those of policy planning and liaison between Parliament and the agencies, while the agencies themselves carry out the actual administrative functions under acts of Parliament. Such legislation is usually sufficiently flexible to give the agencies very broad decision-making powers. Some agencies are headed by civil servants only, but the most important ones are headed by "Boards" in which the main interest organizations are represented in accordance with the specific tasks of the agency.

A further factor which strongly underlines the participatory character of present-day Swedish society is to be found in the legislative process. Commissions and committees are regularly established before major legislative steps are contemplated. In addition to the hearings which these committees or commissions may be holding in preparing their reports, the reports themselves are then circulated again for "comment" (remiss) to the various agencies as well as the private interest organizations. Their comments play an important role in the drafting of the bills to be submitted to Parliament.

Thus the labour-management relationship in Sweden is by no means solely based on the institutions which the parties on the labour market have created for themselves but is fortified by and expanded into the legislative and administrative process of the state. 2/

It would go far beyond the purpose of this paper (and the competence of its author) to analyze in any detail the structures and working methods of the various national institutions with labour and management representation mentioned above or to undertake an assessment of their successes and failures. They vary a great deal: in the composition of membership, in methods of nominations and appointments, whether governments are directly represented, whether expert members are included, their research facilities, whether they are purely consultative or actually decision making, whether they deal with broad issues on economic and social policies only or whether they are the forum where actual and detailed negotiations between management and labour lead to specific agreements. All these variations and combinations of variations can be found amongst them. What remains important in our context is the participatory character of labour and management representations in shaping national economic and social policies.

If the approach to the creation of these national-level institutions has been essentially pragmatic and shows, on the whole, little influence of specific ideologies, the same cannot be said of various types of plant-level institutions. Indeed, at that level, what seems to be at work is a confluence of many and most contradictory ideological streams: concepts of the corporatist state, christian social ethics (in particular Catholic thought as formulated in the papal encyclicals on social questions), democratic socialism and even anarcho-syndicalism. Given an additional shot from the new expertise in labour-management communications, no wonder then that expressions such as "labour representation", "participation", "consultation", "co-determination" have become a matter of semantic confusion where each of them seems to mean different things to different people with different aims.

Whatever the long-range social objectives, essentially all plant-level institutions of labour-management relations appear to have three immediate and interrelated aims:

-- to secure a greater influence of the work force on its work environment and thus to obtain greater work satisfaction;
-- to secure a modicum of participation in managerial decisions in so far as they affect the labour force;
-- to increase productivity as a common interest of both management and labour.

Practically all European countries have developed plant-level institutions of labour-management relations to this effect. They usually go under the name of "works councils". Hitherto two distinct types have emerged. One could be said to embody the principle of "co-operation", the other the principle of "confrontation". This does not mean that their aims are mutually exclusive. In fact in a number of countries they operate side by side. Accordingly, the first type of works councils are joint labour-management bodies, while in the second case management is "confronted" by committees consisting solely of elected members of the work force and operating independently from management. Both types of works councils may be based on law as in some countries or on agreement, as in others, or, where they operate simultaneously, one type may be based on law, the other on agreement.

In the Scandinavian countries the emphasis has traditionally been on joint labour-management bodies arrived at by agreement. The works councils of the Netherlands, Belgium and France are also joint bodies but here they are based upon specific legislation. Belgium knows in addition also a unilaterally composed work force representation based on agreement. In France, on the other hand, the works council legislation of 1945, aimed at the

creation of joint bodies but later added legislation to institute also unilaterally composed work force representation. However, while the works council legislation speaks of "establishments" in which the councils are to be created, the representation legislation speaks of "undertakings". As a consequence, if a plant has separate divisions, the works council of the main plant only covers that particular establishment and the other departments are only entitled to elect works representatives. On the other hand, if an undertaking has several independent establishments, provided that they employ more than 50 workers, they may establish separate works councils for each in addition to a central one for the whole undertaking. The essential difference in the function of the two representation types are that the workers' representatives act as "shop stewards" by submitting workers' demands and defending their interests vis-à-vis management, whereas the works councils are entitled to express opinions on the way the enterprise is run and may even manage certain social welfare activities at the level of the enterprise. 3/

The practical effects of the French works council legislation on plant level relations have widely been called into doubt. The General Strike of May 1968 undoubtedly further revealed the weaknesses of the French industrial relations system just at the enterprise and plant level. It should be noted though that the new Agreement on Manpower and Employment which is briefly discussed in the following section on "Human Adjustment to Industrial Conversion" could enhance the role of the works councils as it obligates the employers to give advance warning to these councils.

In Germany, Austria and Italy the emphasis is on work force representation committees, based in Germany and Austria on law, and in Italy on agreement. Partly they fulfil shop steward functions, but their actual powers go

far beyond that as in Germany and Austria they are entitled to conclude separate agreements (enterprise agreements) in addition to the centrally arrived at collective agreements as well as to representation in the controlling organs of enterprises.

The Italian case is a very special one. According to an inter-union agreement the Italian so-called "internal commissions" (commissioni interni) have no right to conclude independent agreements and were supposed to serve essentially only shop steward functions without interference into the bargaining rights of the trade unions. Nevertheless, they have taken over more and more the functions of local trade union bodies, including the conclusion of enterprise agreements carrying on a veritable bargaining activity. Trade unions have, therefore, often clashed with the "internal commissions". On the other hand, the different trade union centres take different positions concerning an eventual legal recognition of these commissions: the communist-socialist CGIL being in favour, the christian-democratic oriented CISL being against. Whether this difference in attitudes is ideological or pragmatic is difficult to discern as both argue on the basis of principle. However, there is little doubt that in view of the divisions in the Italian trade union movement and the inherent problems of centralized bargaining, the "internal commissions" have taken on an importance in Italy which at times threatens to outpace the trade union movement as a whole. 4/

The German and Austrian legislation makes the work force representation committee ("Betriebsrat") an obligatory constituent part of the enterprise structure. On these committees evolve the day-by-day supervision of the observance of collective agreements, work rules, etc. In fact, they act, in many matters which, on this continent as well as in other European countries, are the prerogatives of the unions quite in addition to the already-mentioned

powers of concluding enterprise agreements that deal with pay increases, allowances, and other benefits.

The strength of the German and Austrian system lies, firstly, in the clear definition of the rights and duties of these committees and, secondly, in their by now unquestioned acceptance by workers as well as by management as the legitimate intermediary in all day-to-day problems concerning individual workers as well as of the work force as a whole within the enterprise. They have considerable powers of initiative, meet and discuss independently from management, and have immediate and ready access to management. Their members are legally protected against dismissal and, in major establishments, the chairman of the committees are usually freed of their regular duties and may have their own offices and staff. On the other hand, the law attempts to draw a strict line between the powers of the plant-level committees and the rights and powers of the unions. Thus, the committees cannot call strikes, which is a sole prerogative of the unions, and enterprise agreements have not the same legal protection as the union-concluded collective agreements.

There are two German pieces of legislation which deal with work force representation and the rights of the work force within the enterprise: the Works Constitution Act of 1952 and the Co-Determination Acts of 1950 and 1956.

The Works Constitution Act, which has by far the widest application, has the distinction of providing a fairly clear definition of the concepts of consultation and co-determination. The right of consultation of the work force entails the duty of the employer to inform and obtain the advice of the work force as represented by the committee, but for his actions does not depend on the consent of the committee. Co-determination, on the other hand, establishes the duty of the employer to act only after having obtained such a consent. In both cases machinery is provided to settle arising disputes as much

as is possible within the enterprise but, as a last resort, such disputes may be referred to the Labour Courts.

The right of co-determination applies primarily to certain areas of social and personnel policies. Social matters are defined as start and finish of daily work periods, rest periods, time, place and methods of wage payments, holiday planning, training and retraining, administration of welfare arrangements, maintenance of work discipline and conduct. In personnel matters co-determination applies to rules on hirings and firings, transfers from one wage category to another, transfers from one work place to another, etc.

The right of consultation extends to health and safety, to receiving information concerning reorganizations and appointments or transfer or managerial personnel, to be heard before individual dismissals take place and, as before, large scale changes in employment. In economic matters the opinion and advice of the work force committee is to be obtained in questions of plant closings, curtailment of production, mergers, if the purpose of the enterprise is being changed or plant installations are to be used for other types of production (but not if these changes are forced by changes in market conditions), and if the employer plans to introduce basically new production and work methods but "not if the new methods obviously correspond to or serve technological progress". 5/

The Work Representation Act and the equivalent Austrian Act in addition secure numerically limited representation of the work force in the controlling organs of enterprises but not in executive management.

Although the effectiveness of the Work Force Committees will obviously differ from enterprise to enterprise, there is little doubt about the acceptance of the system as such, not only by labour but by management. Thus, the "Deutsche Industrie Institute", a management agency wrote:

(Translation)
The employers expressively recognize without reservation the work and achievement of labour. Stemming from the recognitions that nothing can be achieved without the other party, a new orientation has been developed on the part of the employers towards their employees and their problems. The employers, therefore, consent to co-operation and co-determination with the employees as laid down in the Works Constitution Act. 6/

Studies undertaken in considerable depth by the "Institute for Social Research and Self-help" 7/ have established that the representation system, as it functions under the Act, works to the general satisfaction of the employees. Within the system established by this legislation, it is the institution of the Work Force Committee which is best known and appreciated by the individual workers and employees since it is closest to their daily problems and desires. On the other hand, the joint Economic Committees also encouraged by the Act as instruments of direct labour-management co-operation, are far less known and have only been established in a limited number of major enterprises. Nevertheless, the above-mentioned study also revealed that, where these joint Economic Committees exist, there is a definite correlation between the degree of satisfaction expressed by employees with the quality and amount of information received from management as compared with enterprises which rely solely on the unilateral Work Force Committees. This may be partly due to the fact that the Work Force Committees are ex officio represented in the Economic Committees thus providing an additional and trusted channel of information.

The relationship between the work force representation committees with their strong powers and immediate contact with the individual workers, on the one side, and the German unions on the other, could appear—and sometimes have proven to be—problematic. The unions have certain rights vis-à-vis the committees, although the law underlines their independence and separation

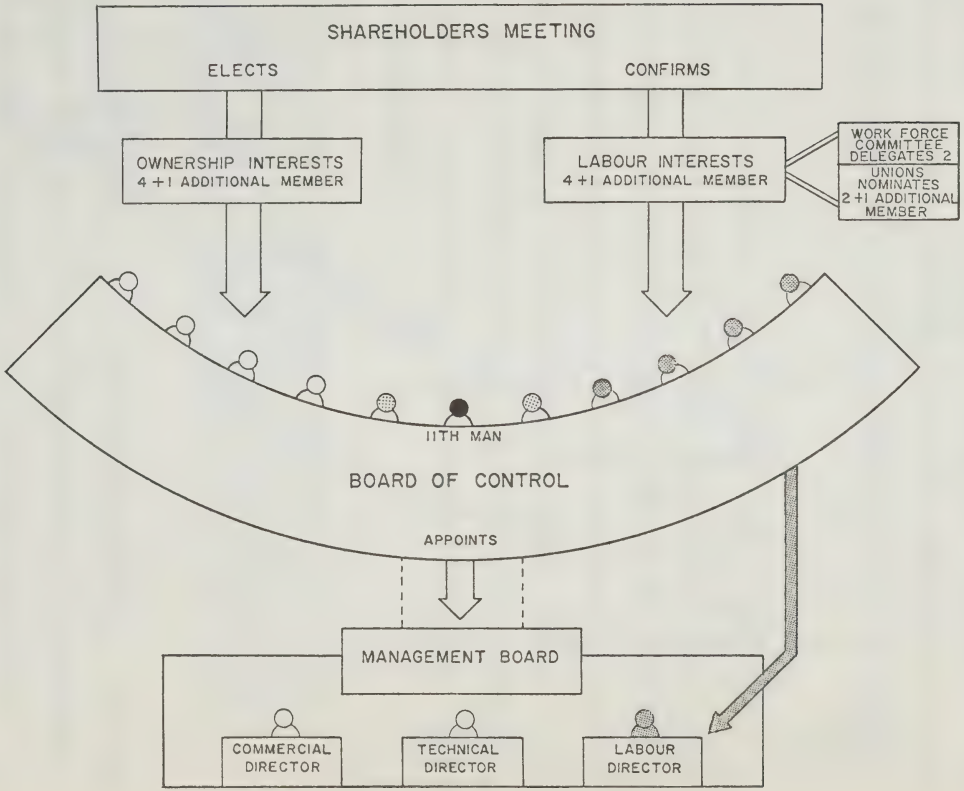
from traditional union business. It is, however, rather doubtful whether either the workers or the employers are all too strict in observing the injunctions in that respect. In any case, the degree of unionization of the committee members (approximately 150,000 in 25,000 enterprises) far outpaces that of the German labour force as a whole. In Austria this discrepancy is far less pronounced because of the far greater degree of unionization in general. In both countries it is quite evident that the committee members constitute the most active core of the trade union movement and serve as its eyes and ears at the plant level. There is also no question that the unions tend to concentrate their information and, above all, educational activities on them and that the committees are the training ground for union leadership and many other functions in the labour movement.

The German Co-Determination Act of 1950 is, in its application and implications, completely unique in the western world. Here the concept of co-determination (usually referred to as "qualified" co-determination) is extended in comparison with the Works Constitution Act in three ways: first, the representation of labour, work force and unions is numerically equal to ownership representation in the controlling organ of the corporation (principle of "parity"); second, the controlling organ (Board of Control) is chaired by a "neutral" and the ownership as well as the labour side is augmented by an "additional" member who may not have any direct interest in the enterprise or union represented in the enterprise; third, the work force is represented in executive management (Management Board) by a "Labour Director". (see charts pp. 129-30).

Although the law does not in any way specify his function but only declares him co-equal to the other members of executive management, in most instances he fulfils the functions of a Director of Personnel. Thus, on

BOARD OF CONTROL AND MANAGEMENT BOARD ACCORDING TO CO-DETERMINATION ACT ("QUALIFIED CO-DETERMINATION")

(COMPANY WITH 11 BOARD OF CONTROL MEMBERS)



BOARD OF CONTROL

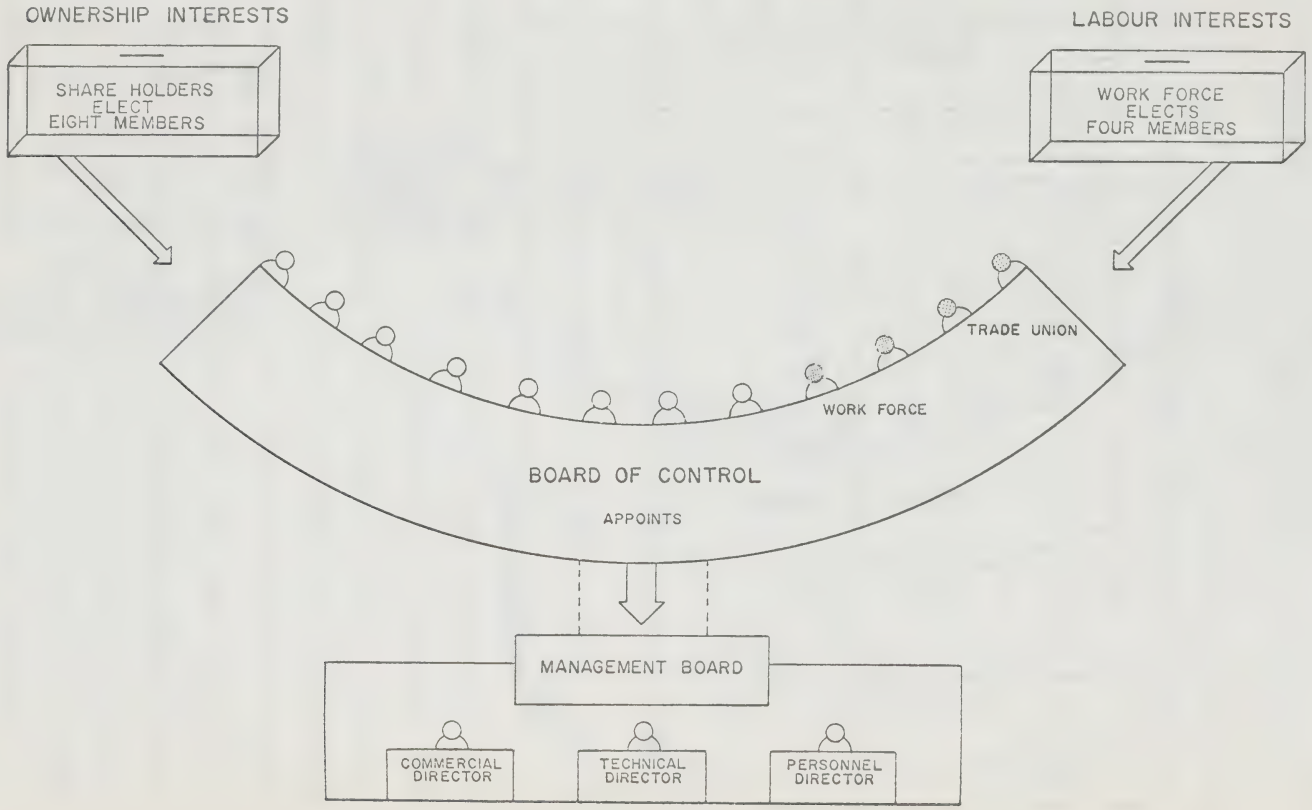
- NEUTRAL (11TH MAN)
- ADDITIONAL
- OWNERSHIP
- WORK FORCE AND UNION

MANAGEMENT

LABOUR DIRECTOR
(APPOINTMENT OR DISMISSAL)
ONLY WITH CONSENT OF MAJORITY OF LABOUR INTEREST MEMBERS

BOARD OF CONTROL AND MANAGEMENT BOARD ACCORDING TO WORKS CONSTITUTION ACT

(COMPANY WITH 12 MEMBER BOARD OF CONTROL)



the one side he is to represent labour within executive management but, on the other, represents management vis-à-vis the work force. This duality is perhaps the most puzzling aspect of the system. It should be noted that at present the Co-Determination Act of 1950 applies only to the coal and steel industry and thus to less than 10 per cent of the labour force. However, the extension of the Act to all enterprises of over 2,000 employees is official German trade union policy. This has led to the establishment of a Commission of Inquiry by the German government which is to investigate the workings of the system as well as the implications of possible extension to industry in general.

Needless to say, the question of the more general application of "qualified co-determination" is one of the most contentious issues in present-day Germany and strongly resisted by management. It is to be noted that the origin of the Co-Determination Act is clearly political. The first legislation was in fact introduced by the Allied Occupation Powers because of the role played by coal and steel magnates in the rise of National Socialism. Even into the present, a certain distrust has remained a motivating force in the trade union movement:

> Without massive financial assistance by some industrial concerns, Hitler could hardly have come to power. Therefore, we are burned children, and we will continue to insist on our demands for the democratization of the economy. We regard co-determination as an instrument to expand and safe-guard a free and democratic political order. 8/

Against this background the almost obsessive preoccupation of the German trade union movement with the question of representation within management is becoming somewhat more intelligible. Can it be said that "qualified co-determination" has brought German labour more tangible benefits than implied

in a prevention of possible abuse of economic power by the German heavy industry for political purposes? This question is the more difficult to answer as quite obviously in most other respects the German trade unions hardly rely on representation in management bodies alone, but on the traditional forms of collective bargaining and on the powers conferred upon the Work Force Committees which incidentally also operate in the enterprises under the "Co-Determination" legislation.

Impressions gained through interviews with randomly selected personalities can hardly serve as conclusions objectively arrived at. After sounding this cautionary note, the following could be said:

There appears to be little evidence that the major economic decisions of the coal and steel industry would have been different in the absence of work force and union representatives. In fact, the observation was conveyed that in a number of instances their presence has led to a certain "enterprise patriotism" in the defence of sometimes rather narrow enterprise or sectional interests.

German union spokesmen tend to underplay or even deny that there are any problems attached to the "duality" in the role of labour representatives in management, and in particular in the role of the Labour Director. It is, however, admitted that this position requires high calibre manpower which has not always been available. While some Labour Directors have been highly successful in maintaining the confidence both of management and of the work force, thanks to their personality and training, others remained ineffective in management and became distrusted by the employees.

The most positive claim as to benefits derived from the presence of labour representatives in management concerned the effects of technological

and structural changes in the German coal and steel industry and the development and realization of "social plans" aimed at mitigating the hardships suffered by its workers and employees. It was admitted though that most likely the same results could have been obtained by the traditional methods of negotiation but that acceptance of these plans was greatly facilitated as they usually were based upon understandings with the Work Force Committees before they even reached the final decision-making bodies. Thus the possibility of actual conflict had been greatly reduced.

The persistent demand of the German trade union movement to extend "qualified co-determination" to the major enterprises in industry as a whole is most likely due to the decline of the coal and steel industry both in the number of workers employed as well as relative in economic importance to other, especially the automotive and chemical, industries. However, the basic motivational factor, the fear of a possible attack on the democratic institutions by the new "captains of industry" in imitation of the old, cannot be lightly dismissed. Whether justified or not, it is undoubtedly real.

The absence of such a motivational factor is partly, but only partly, the explanation of why "qualified co-determination" does not appear to be on the demand list of the European trade union movement outside Germany. Attitudes vary from cautious hesitancy to objections on principle. Thus, a joint committee of the Danish Federation of Trade Unions and the Danish Social-Democratic Party, which prepared the ground for negotiations concerning the revision of the present Works Council Agreement stated:

> (Translation)
> From the experiences which have been made in countries where wage earners have the right of representation in the management of enterprises, it appears that there is nothing which indicates that these wage earners have been able to obtain a higher standard of

> living than the wage earners without such rights or in comparison with wage earners, for example in Sweden and Denmark. Or in other words: there are other factors than employee representation in corporation management that are decisive in determining the wage level of the various wage earner categories. 9/

In another significant passage of the same document the Danish Committee further argued that labour representation in the management of enterprises may be a step, and an important step, towards "economic democracy", but only if and when a change in the distribution of property has been obtained:

> (Translation)
> The Committee is of the opinion that the representation question (i.e. representation in management) best can be solved and only then has real meaning, when society's political-economic development has gone so far that the conditions for another balance in property distribution had been obtained than at present, or, when the labour movement has been able, for example, through funding, to invest such means into the economy that economic influence is actually secured. 10/

In the Netherlands the Joint Consultative Committees Act of 1950, established as the task of these committees "the best possible functioning of the enterprise". The committees were envisaged as bodies of consultation but without powers of decision. They were to deal with the wishes, complaints and comments brought to their notice by the employees; to be consulted with regard to fixing holiday dates, duty rosters, shifts and breaks, in so far as this is not done at a higher level of branch of industry; to supervise the observance of conditions of employment and of the application of health and safety legislation; to participate in the administration of social welfare institutions of the enterprise in so far as not provided by law in other ways; and to advise on measures that may contribute to technical and economic improvements within the enterprise. The law also obligates the employers to provide all information which the committees need to exercise their function as well as periodical insight into the economic development of the enterprise.

Employers are to act as chairmen of the committees. The right to nominate the labour membership of the committees is reserved for the recognized unions.

Industrial Branch Committees under the Economic and Social Council are to exercise a supervisory function over the activities of the plant-level committees in each industry. For those sectors of the economy for which there are no industrial branch committees, the Economic and Social Council has set up a General Industrial Committee.

The Dutch legislation does not foresee any sanctions in the case of employer or union resistance against the establishment of a works council. Nevertheless, their existence is fairly widespread although considerably more common amongst larger enterprises (over 1,000 employees) than medium and small establishments.

A good deal of criticism of the present works council system of The Netherlands can be heard, partly because the high hopes which had been placed in the legislation during the period of the "social romanticism" of the early post-war years were not fulfilled. On the part of the employers the view has been expressed that the councils are exercises in futility and little more than collection boxes for complaints; on the part of the works councils that management does not take into account their views, that they are informed too late, in some cases only after decisions have been taken; on the part of the unions that many works councils do not make full use even of the limited powers conferred on them by legislation and that their lack of significance has lead to lack of interest on the part of the workers and trade union members.

A reform of the works councils system is now being sought, significantly in connection with proposed changes in company law. An expert commission

appointed by the Social and Economic Council has proposed a special tribunal which would control the way an enterprise fulfils its obligations to reveal relevant information not only to shareholders but also the work force and the general public. Further suggested is an extension of the consultative status of the councils in matters of "vital interest to the work force" such as dissolution of a firm, mergers, transfers of capital, changes in production and production methods. The most controversial aspect of these proposals is the recommendation that the work force should have the right to delegate a number of members to the controlling organs of the enterprise though such members would neither be employees of the firm nor representatives of a union directly involved. On the union side the main criticism appears to be that even under these proposals management would not have the duty to inform and consult before, rather than after, decisions affecting the work force have been taken.

The Swedish works council system is based upon an agreement reached first in 1946 between the central employers' and trade union organization. Both the employers and the unions have remained in principle opposed to legislation in this matter with the argument that legislation could only count on a passive and formal adherence to the provisions of the law, while an agreement can count on the parties' support and engagement in realizing the ideas and aims which are contained in, and lie behind, the agreement. Although both union and management organizations have made considerable effort to make the councils a more effective instrument of plant-level relations, studies undertaken in the early sixties by the main trade union and employers' organizations showed that the joint committees had made no really siginficant contribution to labour-management relations at the plant level. On the basis of these studies the unions came to the conclusion

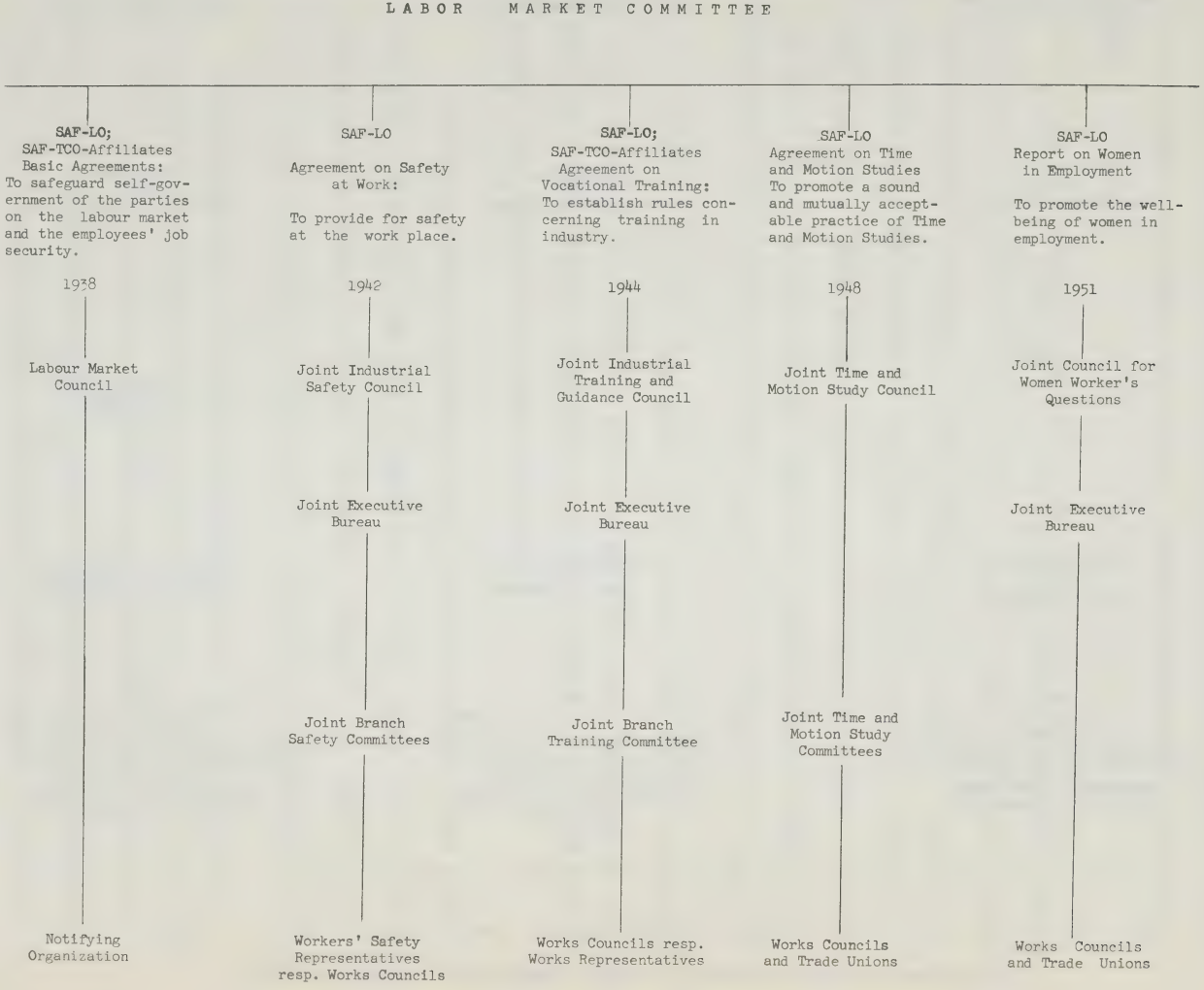
that it was no longer sufficient to amend the existing agreements piecemeal but that a new agreement was desirable. The subsequent negotiations in 1966 in fact resulted in three new agreements: a works council agreement proper, the main principles of which may be said to have established advance consultation rather than post factum information on decisions affecting the labour force and the establishment of a direct personal link between the councils and the local unions; a further agreement which sets out the general philosophy of labour-management co-operation and establishes a new joint body at the national level, the so-called "Development Council for Co-operation Questions" entrusted with research and information tasks: and finally, an agreement which emphasizes the need of training the works council membership, the costs of which are to become part of the company cost structure. 11/

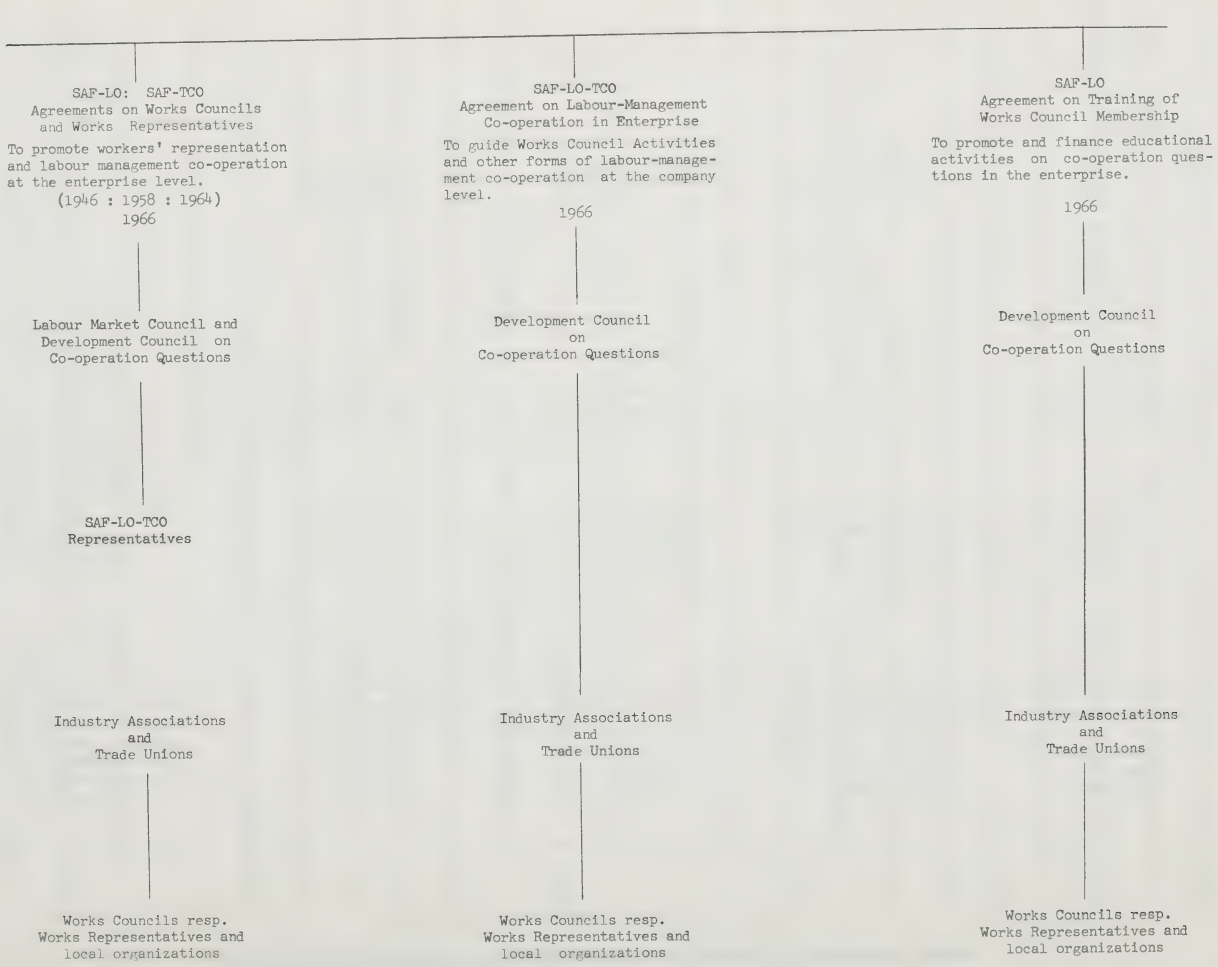
These new agreements went into effect at the beginning of 1967. Towards the end of 1968, the LO published the results of a survey amongst the works council membership in 1,700 enterprises affiliated with its agreement partner on the management side. The most striking result of this survey was that expected improvements in the workings of the works councils were largely restricted to those enterprises which had already been active in this field. In conformity with previous observations these were in the main large scale enterprises. Typically the agreed upon minimum number of works council meetings were held in 94 per cent of the large enterprises but only in 64 per cent of the smaller ones. However, only a slight majority of the works council members expressed satisfaction with the type and amount of information received from management. Moreover, 20 per cent had difficulties in assessing and evaluating the given information. Advance information—one of the main aims of the agreement—was provided in only 38 per cent of the firms surveyed, while in 36 per cent of the cases the information was

received only at the time of the meetings. In 19 per cent of the enterprises works councils received no documentation at all. Even this result demonstrated an improvement over previous surveys, but again primarily restricted to larger enterprises and even there mainly to matters of personnel and production. For as yet unexplained reasons, the most significant progress was made in the so-called "suggestion" area. The number of suggestions for production improvements processed by the works councils suddenly jumped in 1967 by about 40 per cent and the payments of bonuses paid to the work force for such suggestions by over 50 per cent. On the basis of the Works Council Agreement certain managements had in fact delegated to the council rights of decision in this area. However, it has not as yet been established whether the increase has actually taken place just in these enterprises.

As mentioned above, part of the whole process of works council reform was to be the training of the works council membership. The LO has been most critical of the lack of progress in this field, particularly in matters of financing these training efforts. This was ascribed to the lack of interest and unwillingness on the management side to implement the understanding reached between the LO and the SAF. It was noted that this understanding had not had the binding effect of a collective agreement proper and the unions indicated that they may have to insist on incorporating the necessary provisions into legally binding collective agreements.

The Danish works council system goes back to an agreement reached as early as 1905. The reform of the present agreement is at the time of writing in the stage of negotiations between the Employers' and Trade Union Federation, whereby the trade union proposals are based upon the commission report on "Democracy in the Enterprise" mentioned above. They seem to embrace the Swedish approach as well as certain aspects of the German legislation, such


LABOR MARKET COMMITTEE
SAF-LO;
SAF-TCO-Affiliates
Basic Agreements:
To safeguard self-government of the parties on the labour market and the employees' job security.
1938
Labour Market Council
Notifying Organization
SAF-LO
Agreement on Safety at Work:
To provide for safety at the work place.
1942
Joint Industrial Safety Council
Joint Executive Bureau
Joint Branch Safety Committees
Workers' Safety Representatives resp. Works Councils
SAF-LO;
SAF-TCO-Affiliates
Agreement on Vocational Training:
To establish rules concerning training in industry.
1944
Joint Industrial Training and Guidance Council
Joint Executive Bureau
Joint Branch Training Committee
Works Councils resp. Works Representatives
SAF-LO
Agreement on Time and Motion Studies
To promote a sound and mutually acceptable practice of Time and Motion Studies.
1948
Joint Time and Motion Study Council
Joint Time and Motion Study Committees
Works Councils and Trade Unions
SAF-LO
Report on Women in Employment
To promote the well-being of women in employment.
1951
Joint Council for Women Worker's Questions
Joint Executive Bureau
Works Councils and Trade Unions


LABOR MARKET COMMITTEE
SAF-LO: SAF-TCO
Agreements on Works Councils and Works Representatives
To promote workers' representation and labour management co-operation at the enterprise level.
(1946 : 1958 : 1964)
1966
Labour Market Council and Development Council on Co-operation Questions
SAF-LO-TCO Representatives
Industry Associations and Trade Unions
Works Councils resp. Works Representatives and local organizations
SAF-LO-TCO
Agreement on Labour-Management Co-operation in Enterprise
To guide Works Council Activities and other forms of labour-management co-operation at the company level.
1966
Development Council on Co-operation Questions
Industry Associations and Trade Unions
Works Councils resp. Works Representatives and local organizations
SAF-LO
Agreement on Training of Works Council Membership
To promote and finance educational activities on co-operation questions in the enterprise.
1966
Development Council on Co-operation Questions
Industry Associations and Trade Unions
Works Councils resp. Works Representatives and local organizations

as the definition of the meaning of consultation and co-determination without extending, as already indicated, to labour representation into management.

On the whole, there seems to be a striking contrast between the results obtained by management and labour representation in the institutions created in many European countries at the national level and the difficulties and disappointments experienced by joint bodies at the enterprise level in the same countries. Nevertheless, it must be regarded as significant that in all the countries in which joint consultative bodies have been instituted at the plant level the search for a solution of these problems still goes on.

Hitherto this search has mainly been concerned with trying to establish why the existing works councils have generally been less effective in fulfilling their aims than was hoped for. A summary of possible answers will be found in the chapter "Conclusions" under point (2).

There are, however, indications that this search may well take a new direction. Hitherto, much of the discussion has still been bound to its historical origin, namely to see in "industrial democracy" some kind of a corollary to political democracy with a certain parallelism of institutional forms.

What appears to be beginning to be perceived is the fact that such "representational" democracy, even if institutionally perfected, by no means as yet guarantees the actual participation of the labour force, thus limiting the potential contribution to greater productivity and job satisfaction. In fact, the question is being asked whether this insistance on traditional forms of "representation" does not help to emphasize, even to perpetuate also the traditional hierarchial concept of management as a downward stretching

chain of command. Even so, the observation is almost universal that co-operative schemes at the plant level have been more successful in large enterprises than in medium and small ones. This apparent paradox may well be explicable by the changing nature of management which in the larger scale enterprise is becoming not only more and more specialized as to function but also more decentralized as to responsibilities. Thus the integration of the individual into the "group" charged with responsibilities for the realization of specific tasks becomes not only possible but almost inevitable. Functionally "management" may well not stop at a specific level but become diffused over the whole enterprise complex. Experiments with "self-guiding" groups of workers made aware of and consciously aiming towards the overall objective of the enterprise, have been made over several years in a number of Norwegian enterprises following a study jointly commissioned by the Employers' and Trade Union Federations. A recently published report indicates that the majority of workers operating under the new system saw definite improvements in relations with "top" management, in relations to other workers, understanding in the objectives of the enterprise, increased responsibilities and greater training possibilities. Similar satisfaction was expressed by managements. 12/

These experiments have as yet been on too limited a scale to lead to more than tentative conclusions. However, the results appear sufficiently positive that similar experiments are intended in Sweden.

Human Adjustment to Industrial Conversion: The Right to Employment

It may have been noted from the foregoing section on labour representation at the enterprise level that practically all the attempts to reform and

improve the existing institutional arrangements were of relatively recent date and centred around one basic question: the extension of the influence of the work force on managerial decisions through advance consultation and negotiation. While, as we have tried to indicate, ideological influences of various kinds are at work, there is little doubt that the immediate concern is more directly related to the problems of human adjustment to technological and structural change.

This trend of thought was clearly expressed at the international level by a resolution accepted at the 1966 conference of the International Labour Organization demanding a study of the diverse measures taken in the world to enable workers to participate in important decisions within their enterprise:

> noting that the evolution of technology and the expansion of the economy influences in an increasing manner the conditions of life and work;
>
> noting that in various countries having different economic and social structures, efforts have been made to give workers the right to participate in the decisions taken in their enterprises especially those affecting conditions of work and life;
>
> considering that the following questions should not be decided without consultation of the work force: mergers of one enterprise with another; shut-down of an enterprise, or, of an important part of the enterprise; the introduction of technological change having as a consequence the reduction in employment; important extensions of the enterprise. 13/

Nevertheless, until relatively recently the problems of human adjustment to technological and structural change appear to have aroused little more than theoretical interest in most of Europe despite some warning cries of individual unions. Several facts may explain this: first, during most of the post-war period there has been full and even overfull employment in almost all European countries; even for the next decade or so the rate of

growth of the European labour force will be substantially lower than in Canada and may be even negative in some countries, such as Germany and Sweden. Second, the tempo of industrial conversion was, for long, considerably slower than in North America. Third, active manpower policies were introduced in a more or less cohesive fashion relatively early. Even if they tended originally to be more concerned with the rational use of scarce manpower than with the employment effects of technological change, it may be observed that some of the techniques such as, for example, measures to promote geographic and occupational mobility, are applicable in situations of manpower scarcity as well as in unemployment situations arising from technological and structural changes.

In consequence, the employment effect of technological and other changes aroused relatively little interest in Europe at a time when in North America, with its much higher unemployment rates, it had already become a burning issue. European unions as well as management appeared to be of the opinion that by and large the employment effects of changes would be sufficiently small and gradual to be taken care of by the existing and new job opportunities. Indeed, the statistics on unfilled job openings have been for long a more significant measure of the fluctuations on the labour market than the unemployment figures.

As a result, until 1967 and even into 1968, available sources indicated that few collective agreements contained specific provisions concerning technological change. In this respect, one further contributing factor also has to be considered. In a number of these countries the individual contract of employment remains the formal foundation of the employment relationship and, while it seldom exists as a written document it has a very real existence as

a legal concept (McPherson and Meyers). The conditions under which such a contract of employment may be terminated are then set by law, such as the obligation to give prior notice of specified duration, or even that the employer may have to obtain special permission for dismissals from the labour market authorities.

The idea that enterprise has obligations vis-à-vis the community as a whole for the use of human labour as a productive resource is obviously not restricted to Europe:

> The freedom to dismiss wage earners whose use has become redundant, i.e., to eliminate them as factors in the cost of production, has become subject to certain restrictions. Naturally, the obligation to provide job security is not unlimited. Nevertheless, the employer can no longer treat human labour as a direct factor in the cost of production that can be increased and decreased in direct proportion to production. Many types of work have already assumed the character of partially fixed and partially variable costs which obligate the employer to payments of wages over a definite period without consideration of the fluctuations in production. The end of this development has not yet been reached but we are in the midst of moving in that direction. The recognition is becoming irresistible that the maintenance of income of all households is a social obligation. It can only if an essential part of this responsibility is being placed on enterprise.... 14/

European labour law being much closer to actual working conditions than labour law on this continent has increasingly tended to establish such obligations. The "right to employment" becomes a fundamental human right. Thus it is heading all other provisions of the European Social Charter as Article I, Paragraph 1:

> Everyone should have the opportunity to earn his living in any occupation freely entered upon.

The acceptance of the idea of employment as a matter of right has profound political and legal consequences. At the level of government it has given the goal of full employment almost absolute priority, and as far as

the individual enterprise is concerned it may place several legal restrictions on management.

Referring to Article 4 of the Italian constitution which specifically recognizes "the right of employment of all citizens", an Italian labour law expert comments:

> (Translation)
> This (right of employment) has been interpreted not only to mean an obligation of the government to follow full employment policies, but also as implying the right to damages to those who are deprived of employment. Interpreted in this way it means not only the right to obtain and maintain a job, but to make every dismissal an illegal act unless objectively justified. Recent legislation (July 1966) has in fact not only defined the conditions under which a person can be dismissed from his job, but also fixed in addition to already existing obligations supplementary indemnities as damages in case of contravention. 15/

In the Netherlands employers are obliged not only to inform the public employment offices of intended layoffs and shutdowns but have to obtain the explicit approval of the employment offices which are assisted by joint labour-management bodies.

In Germany the civil courts have for years recognized that a person has a right within the meaning of the Civil Code in his enterprise as an organized and going concern, but the Federal Labour Court uses a definition of this right which is even wider than that of the civil courts. The employee's right in his job is based on the Act for Protection against Unjustified Dismissals of 1952 by which, in effect, the employer may discharge an employee only if the discharge is necessary. 16/ Similarly as in the Netherlands, the law obliges the employers to notify the employment service, in writing, of any massive dismissal of workers. For example, notification is required if more than five employees are affected in enterprises employing between 21

and 40 workers. The usually applied measure is in respect of 10 per cent of the work force according to its total size.

Job security provisions in agreements obviously predate the concern about the effects of change but tended in the past to be merely supplementary to legal provisions and public policy. In passing it may be mentioned though that such provisions tended to stress social obligations rather than individually acquired rights. Seniority rules based upon rights acquired by length of service seldom took precedence over such obligations. Typical for this is the reference to seniority in the 1966 Swedish Works Council Agreement (para. 21):

> Consideration shall be given to the need of the enterprise in being served by skillful and competent workers, and wherever the choice is between workers who are equally skillful and competent, to the length of employment as well as to especially heavy family obligations.

During the last year or two, the relative indifference to the effects of technological change in collective bargaining has, however, given way to an increased emphasis in special usually industry-wide agreements.

An agreement reached in France between the state railways and the unions was specially designed to deal with the impact of technological changes on employment, providing amongst others for management consultation with the unions at regional and local levels on policy changes concerning workers, anticipated transfers, etc., expansion of general education and vocational training programmes to assist in relocating displaced workers, and improved promotion opportunities to mitigate the effects of staff reductions on careers.

Of even greater importance may be the national agreement between the two largest employers' associations and the five "most representative" trade union centres in February 1969. This agreement, which covers more than eight million workers and was signed independently from government, is perhaps the hitherto most significant of the shock effects following the May 1968 events in France. Under this agreement joint committees are to be set up at the national level, for each industrial sector and in some cases at the regional level. Their main purpose will be to provide information on employment matters, to study existing training and retraining programmes and to liaise and co-operate with the various agencies responsible for manpower policies. The agreement further stipulates that the works councils are to receive advance warning of massive layoffs with warning periods from eight days to three months according to various circumstances and the number of workers affected. In case layoffs become unavoidable, the workers affected are to receive full pay for a period equal to the period of notice. Management also accepted to seek ways to reduce the number of workers to be laid off by various methods and pay indemnities for reduced wages on a sliding scale.

Perhaps one of the most interesting agreements dealing specifically with technological change is the 1968 agreement for the German metal industry which covers all branches of the iron, metal manufacturing and electrical industries. It establishes the duty of the employer to inform the work force committee (works council) of contemplated changes as soon as plans are sufficiently advanced. The committees will then discuss the effects of the intended changes on the work force. If the change implies a change in the nature of the job or the job is eliminated, the employee concerned is to be transferred to similar or otherwise suitable work, if at all possible. If not possible, the worker will be placed in a pool until such jobs become

available. Seniority provisions are based on a combination of age and length of service. If placement in lower paid jobs becomes inevitable, rates of pay are gradually reduced over an extended period. If separation becomes inevitable, separation allowances are paid also according to a combination of length of service and age. Workers between the ages of 55 and 60 years cannot be dismissed if they have had at least 10 years of service. Retraining is to take place during working hours if within the plant. If away from the plant, leave of absence is to be granted. Costs, including travelling costs, are borne by the employer.

The industries in question form the largest single sector of the German private enterprise and there is little doubt of its pattern-setting effect. Apart from the actual benefits conferred on the workers, perhaps its principle importance lies in the obligation to give advance warning of change to the Works Representation Committees and the erosion of the provision of the Works Constitution Act which exempts technological change from co-determination. Violations of the agreement would constitute a rights dispute in the competence of the labour courts.

Maintenance of income provisions for older workers found in other agreements are not always directly traceable to technological change but concern decline in physical strength, lowered ability to keep up with the work tempo and other physical and mental handicaps related to age, but will have similar effects in cases of technological change.

An interesting innovation is to be found in a regional agreement of the German textile industry setting up a joint labour-management fund to finance supplementary old age pensions for workers over 50 years of age. This concern about income maintenance for older workers is strongly pronounced in a

number of European countries obviously due to the age composition of the labour force. Agreements which set up industry-wide funds to spread the costs of maintenance during lay-offs, short work weeks and severance of employment have also made their appearance.

More recently, concern has also been shown about the effects of automation, especially computerization, on traditional white collar jobs, in particular the effects of the approximation of certain types of work hitherto performed by white collar workers to the work processes and, therefore, working conditions of clerical personnel. This is quite typical for countries where the white collar worker, even in the lower categories, traditionally has been regarded as having a superior social status in comparison with industrial labour.

Training has been a long-standing concern of the trade union movement in most European countries, in particular those where apprenticeship is the most frequent form of training of industrial and even white collar workers and where, therefore, in addition to standards legislation, wages and working conditions of apprentices are regulated by collective agreement. Under the spur of technological and other changes, also retraining is now more and more becoming a matter of agreement. It should be noted, in addition, that in many European countries the labour movement has for almost a century pioneered and very often maintained the adult education movement. In fact, statistics on formal education tend to underestimate the actual educational level of the industrial labour force. Education leave and possibly also education grants and loans—quite apart from retraining—is becoming one of the demands which, for example in Germany and Sweden, the unions put very high on their priority list. 17/

Collective Bargaining and Capital Formation in Workers' Hands

One of the basic economic goals subscribed to by all industrial nations refers to the equitable sharing in rising incomes. The main income of labour being derived from wages and salaries, the question is being asked in a number of countries whether collective bargaining could make a contribution to greater income equality.

Given the fact that in the long run the broad sharing-out of industrial income between wages and salaries on the one hand and profits on the other exhibits a fair degree of stability or, to put it in other words, labour income as derived from wages, salaries and supplementary income from employment as a share of the national income has remained remarkably constant over a long period of time, the conclusion could then be reached that collective bargaining in its traditional form has not been an effective instrument in the redistribution of income.

Obviously this says nothing about whether it has been instrumental in maintaining this share at a constant level or whether wage policies have contributed to a more equitable sharing of income from wages and salaries between various categories of workers.

It did, on the other hand, open the question whether collective bargaining could lead to collective savings in the hands of labour which would secure for it a share in the accumulation of capital as a source of income other than wages and salaries and in this way contribute effectively to a distribution of income apart from the more traditional means, namely, those of fiscal policy.

The idea behind this question has been put perhaps most succinctly by a German labour leader in terms like this:

> (Translation)
> The traditional income distribution does not suffice to permit the participation of labour in the accumulation of capital through individual savings decisions. Moreover, the relationship between investment and consumption necessary for economic growth does not allow all too radical a shift if growth is to be sustained.
>
> With the methods of traditional wage policies no change in the income structure can be obtained. Therefore, they have to be consciously redirected to bring about such a change. To this end it is not sufficient to increase income from wages going directly into consumption but the wage and salary earner has to be provided with the opportunity to participate in the accumulation and ownership of capital—and in this way in the ownership of the means of production. 18/

Lest it be thought that the aim here is simply to put new wine into old socialist bottles, it may be recalled that in more basic terms the same idea was expressed in the encyclical "Mater et Magistra" of Pope John XXIII:

> it is not enough...to assert that man has from nature the right of privately possessing goods as his own including those of productive character, unless at the same time a continuing effort is made to spread the use of this right through all ranks of the citizenry. 19/

Obviously the concern here is not solely with income equalization since realistically the question of the redistribution of income cannot be solely seen from the angle of the wage and salary share in the national income or from the angle of earning differentials within the wage and salary field. What enters here is the idea that by collective savings and investment, organized labour could secure for itself the co-ownership of industry and with this a share in the decision-making process or, as it has sometimes been expressed, "giving workers an interest in the running of the industry".

Profit-sharing as such is naturally not a new idea. Experiments in profit-sharing have been made by individual enterprises in a number of European countries, among others France and Germany, over many years. The most successful were those where the actual aim was to secure for an enterprise a steady supply of highly skilled labour. If these experiments were tolerated rather than promoted by the trade union movement, the reason may be found in the fact that usually such enterprises were far in advance of industry in their general approach to industrial relations, profit-sharing being the most conspicuous, but not necessarily the most important aspect of their employment policies. As a matter of principle, however, European unions quite generally did not, nor do they now, favour profit-sharing in individual enterprises with arguments such as these: profit-sharing of this type accentuates the earning inequalities between enterprises within the same industry: they tie the individual employee to a specific enterprise in contrast to the needs of occupational and geographic mobility: the profit-share is nothing but a variable part of wage costs over which neither the individual employee nor his union has any control whatever. 20/

More recently the so-called Vallon-Amendment to the French budget of 1966 raised the profit-sharing issue again in a more modern version:

> It started out from the premise that while shareholders are not alone in contributing towards self-financing, yet they are the only ones to benefit from it; hence the undertakings ought to be obliged to issue shares representing the growth obtained from self-financing. Half of these new shares ought to go to workers of the undertaking, the other half to the shareholders. The author of the project cited as an example that assuming self-financing went on at the annual rate of 6% and the shares were divided fifty-fifty by the end of 25 years the majority of the capital would be in the hands of workers. 21/

In view of the interest shown the Vallon-Amendment, the French Government set up a committee to study the problem of workers sharing the benefits of self-financing, the difficulties being not so much of a technical or material nature, though these are certainly considerable, but rather arising from the apparent incompatibility of the employers' and workers' interests:

> The employers are opposed to this form of sharing, as they claim that thereby the principle of the unified authority of the undertaking would be put in jeopardy. The trade union organizations, on the other hand, are against the system because in actual fact it does not correspond to the direct interests of the workers. Calculations made by trade union experts show that the increase in income derived from the distribution of shares to the workers would be exceedingly small or virtually non-existent compared with the possibilities of direct wage increases.
>
> The trade unions' refusal is based upon the fact that such sharing of the gains of self-financing would be purely illusory as far as the powers of decision in the undertaking are concerned.... Admittedly the position would be different in the case of a global investment fund. This might, in certain circumstances, serve the purpose, but given the great diversity of the giant societies, such an investment fund would really be no different from existing savings funds whose sole function is to produce interest on the capitals entrusted to them by the savers. 22/

Although opinions within the European labour movement are divided also as to the benefits of collective savings in such funds, the idea remains the subject of continuing interest and debate. As already noted, the Danish labour committee on the reform of works councils implied that collective investments through funds could in the future make participation by labour in industrial management a more realistic goal than at present. One German plan foresaw that part of the corporation tax could be used to form a nationwide fund which would issue "peoples' shares". Another plan was evolved by the Italian trade union centre CISL suggesting that through collective agreement parts of wage increases could be paid out in savings certificates, whereby the savings would be collected in a National Investment Fund jointly administered by management and unions.

In the stage of actual experimentation in Germany is the so-called "Leber-Plan" (after its author Georg Leber, head of the German Construction Workers' Union and at present a member of the German coalition government). Germany is among those European countries which have for long sought to encourage personal savings by making certain portions of them subject to tax exemptions or tax reductions. Germany took this a step further in the First Capital Formation Act of 1961 which introduced premium payments on a certain amount of annual savings as a means of income redistribution. The Second Capital Formation Act of 1965 incorporated the "Leber-Plan", whereby such savings could be obtained by collective agreement in contractually agreed-upon payments per hours of work to be shared in an also agreed upon ratio between employers and employees. The funds thus collected are deposited in a specially created institution which may provide loans to enterprises that are part of the agreement or which may be used for "social purposes" such as housing, etc. However, by the end of 1967 only a very minor percentage of all German workers covered by collective agreements (mainly in the construction industry) had negotiated agreements implementing this plan, partly because of the scepticism of some of the unions as to the actual benefits and partly because of employers' resistence.

Swedish proposals for industry-wide savings funds appear entirely divorced from any considerations such as co-ownership in industry and co-determination:

> (Translation)
> The purpose of the funds would be to facilitate the adjustment of enterprises and their labour force to technological change and could...vary from research, market analysis or consultative services to individual enterprises to training and re-training. Or they could be used for separation allowances and early retirement plans. Fully developed these funds may even finance compensation payments as a rationalization measure to close down or merge no longer viable establishments. 23/

The funds would be formed on the basis of free negotiations between the unions and the corresponding employer associations. Methods of calculating the amounts to be funded would also be a matter of agreement and need not necessarily be bound to the wage bill of the individual enterprise as proposed in other countries. In contrast also to the majority of such plans, no shares or certificates would go to individuals nor would the contributing enterprises have the right to borrow from the funds.

(Translation)
...such a model for capital formation which also would more directly benefit the wage earners, can only play a complementary role to other centralized measures aiming at a more equitable distribution of income and ownership. With this is meant a continued and intensified solidary wage policy that is not limited to parts of the labour market, but even encompasses other groups than wage earners and, therefore, would become a 'solidary incomes policy'; a taxation policy which neither formally or in its effects favours certain types of income; a reasonable but not exaggerated self-financing within the economy which limits a rapid capital accumulation in the hands of a few owners, as well as an expanded social policy which assures the still large groups of the economically disadvantaged—the sick, the old, the unemployed, the families with large numbers of children—an equitable share in rising standards of living. 24/

The International Corporation and Industrial Relations

The emergence of the large international corporation is a phenomenon which has attracted a good deal of attention in recent years. While the history of international operations by some corporations goes back a long way, their major growth has been within the past decade. This is the period during which they have become a really significant economic and public policy factor in North America as well as in Europe. Many of its aspects have been studied: the difference in nature between the large international corporations and the large domestic corporations; the reasons for their sudden growth; the problems of public policy in regard to pricing, competition,

market allocation, taxation and balance of payments; their role in research and development and in the transfer of technological and managerial knowledge; the impact of foreign ownership on domestic policies, etc. Curiously enough, as yet little attention seems to have been paid to their role in industrial relations. It seems to be generally assumed that such corporations will in the various countries conform to the existing framework of labour laws, labour market conditions, customs and traditions. Obviously this is largely true. Nevertheless, the way in which the large international corporations carry out the decisions they are taking in matters such as where production is to be located and what is to be produced and how, the degree of diversification, the trends towards scale and specialization and to mergers and other structural changes, and above all the decision-making process within the corporation itself, are of vital importance to the labour force in the various countries. This presents the trade union movement, nationally and internationally, with new challenges and problems to which it begins to respond and which may give the traditional international co-operation of the European trade unions an entirely new dimension.

Until the Second World War, trade-union co-operation within international organizations primarily, if not exclusively, based upon European unions, was traditionally concerned with the formulation of general policies. Mutual financial assistance in major disputes has also been traditional although on a bilateral and multilateral basis rather than through the international organizations. After the First World War, such assistance was of vital importance to trade union movement such as in Germany and Austria, hit by disastrous inflation. After the Second World War, the assistance rendered in countries like Germany, Austria and Italy was highly instrumental in the speedy reconstruction of the unions, and the political

influence of the United States and British trade union centres on the occupation authorities left very distinct traces on the industrial relations systems in these countries. Moreover, within the International Labour Organization (ILO) with its tripartite character, co-operation in the "Workers' Group" gave further opportunity to anchor broad principles of labour standards in international law. The creation after World War II of the European Coal and Steel Community, the Common Market, the Organization of European Economic Co-operation (later the Organization for Economic Co-operation and Development), gave a strong impetus to extend international trade union co-operation into broader economic and social areas.

Also, the international operations of large corporations as the predecessors of the present day international corporations called international trade union co-operation into action in many ways. Interventions and pressures of a national trade union at the domestic headquarters of such corporations, either through government channels or through employers' associations or directly, in favour of sister unions in case of difficulties and disputes have for many years been a frequent form of assistance and part of the daily operations of international trade union organizations, especially in the case of developing countries.

The more recent emergence of the international corporation in Europe as a major employer has created on the labour side a twofold concern due to the locus of decision making in many instances having shifted to a remote and locally inaccessible management body. Very frequently unions have found in negotiations that management negotiators would either pretend or really did not have the power of final decision and, secondly, operational decisions affecting the labour force were also made by remote control, reducing any

arrangements made domestically which gave the labour force some influence on such decisions to practical impotence. This is not to imply that the large international corporations have been, in all instances, "bad" employers. In many instances, they proved to be bringing into the countries managerial attitudes which favourably contrasted with a tradition-bound local management. What was observed, however, was that the same corporation could act very differently in different countries using existing weaknesses in the domestic industrial relations systems to their immediate advantage.

Confronted with international corporations, trade unions respond now more and more with organizational and tactical changes which are beginning to be referred to as "international collective bargaining". To this end, international trade union bodies in industries where the growth of the international corporation has been especially pronounced (automotive, chemical, and electrical industries) are beginning to restructure themselves from trade groups into groupings which correspond to the corporate structure of the great international employers. A pioneer in this respect has been, not surprisingly, the International Metal Workers' Federation which, among others, combines unions in one of the most highly internationalized and concentrated industries, the automotive industry.

The essential concern is not so much with disparities in nominal wage rates but in the first instance with standardizing working conditions in industries which have reached in all the countries the approximate same technological level coupled with a growing inter-country dependency of production as well as inter-related technological and structural changes. 25/

This does not mean, and may not mean for a long time, the feasibility of joint bargaining at the international level, although certain beginnings

have been made in the form of joint consultations, but goes out at present towards quick transmission of information based upon domestic and international professional research and, to an important extent, to delegation of powers of intervention at the centres of actual decision making.

All this appears to be in the first stages of experimentation but can well be regarded as a significant trend in the changing organizational relationships between the trade union movements in the various countries as well as in the development of industrial relations systems nationally and internationally.

The formation in April 1969 of a "European Confederation of Free Trade Unions" within the European Economic Community, now grouping in a much more tightly knitted structure the unions hitherto rather loosely associated in a "Secretariat of the Six", is a noteworthy development, even if only time can show its full implications.

NOTES AND REFERENCES

1/ Statement of the Chairman of the "Council of Economic Advisors" of June 20, 1964. This Council is an independent body of experts.

2/ In passing, it may be mentioned that according to the Swedish constitution the general public (including the press) has free access to all official documents. All documents received by an agency or ministry become open to inspection immediately on arrival. Similarly, any decision taken becomes public once it has been filed. The rare exceptions—mainly referring to national security and external relations—are set down in legislation. A concise description of the Swedish administrative system is to be found in Pierre Vinde, "The Swedish Civil Service", Ministry of Finance, Stockholm, 1967.

3/ "Joint Consultation and Co-Determination of the Works Councils in Western Europe", European Regional Organization of the International Confederation of the Free Trade Unions, (ICFTU), Spring Seminar 1966, pp. 47-48.

4/ Ibid., pp. 35-36.

5/ Article 72 of the Works Constitution Act concerning technological change has been a considerable bone of contention in recent years. However, agreements more recently concluded have begun to erode the importance of the legislative prohibition.

6/ "Mitbestimmung in der Bundesrepublik Deutschland", Deutsches Industrieinstitut, Köln, 1966, p. 3.

7/ Otto Blume et al, "Normen und Wirklichkeit einer Betriebsverfassung", J.C.B. Mohr, Tuebingen, 1964.

8/ Otto Brenner, quoted in "Automation, Risiko und Chance", Europaeische Verlagstanstalt, Frankfurt, a.M., Vol. II, p. 1102.

9/ "Betaenkning om Demokrati pa Arbejdplatsen", Landsorganisationen i Denmark, Copenhagen, 1961, p. 47.

10/ Ibid., pp. 28-29. On the other hand, the Committee also argued that the corporate structure of much of modern enterprise has divorced the managerial function from ownership. Therefore, consultation and co-determination in matters affecting the labour force of an enterprise can no longer be refused with the argument that management rights emanate from ownership rights. Concerning the reference to "funding" in the quoted passage, see the following section of this chapter.

11/ For further details concerning these agreements, see also P. Malles, "Industrial Relations and Technological Change: Swedish Trade Union and Employers Views and Agreements" in "Relations industrielles",

Laval University Press, pp. 280-94. For the evolution of the institutional framework of Labour-Management Co-operation in Sweden based upon the Works Councils, see tables on pp. 139-140.

12/ "Arbetsgivaren", Stockholm No. 3, February 1969.

13/ International Labour Conference: Provisional Report No. 2, May 19, 1966, Annexes (Original: French).

14/ Neil W. Chamberlain in "Automation, Risiko und Chance", op. cit., Vol. II, p. 798. (Retranslation from the German).

15/ Guiliano Mazzoni, "Revue Internationale de Droit Comparé, op. cit., pp. 64-65.

16/ Thilo Ramm "The Restriction of the Freedom to Strike in the Federal Republic of Germany", "Labour Relations and the Law", p. 206.

17/ European countries show startling differences in school enrolment rates, especially those of secondary and tertiary institutions. In Sweden, the number of students graduating from schools entitling to continuation in institutes of higher learning was, in the middle-sixties, 25 per cent of all school leavers; in Germany only 5 per cent. Also the differences in social background are extreme. In Sweden, 24 per cent of students in senior secondary schools had industrial working class backgrounds; in Germany only 5 per cent, although the percentage of industrial workers in relation to the labour force was almost equal in both countries. "Automation, Risiko, und Chance", Vol. II, pp. 717-18.

18/ Condensed from Georg Leber: "Vermögensbildung in Arbeitnehmerhand", Europäische Verlangsanstalt, Frankfurt, a.M., 1964, pp. 6-7.

19/ N.C.W.E. Translation, St. Paul Editions, pp. 33-34.

20/ In a report to the 1966 Congress of the Swedish Trade Union Federation (LO) the objections against profit-sharing in individual enterprises are given as follows:

> (Translation)
> ...this alternative has been repeatedly rejected by the Swedish LO.... Its greatest weakness is its incompatability with a solidary wage policy. This system also leads to tying employees to an enterprise which from various points of view is undesirable; but also the methods of profit accounting make it difficult for the employees to participate in the real capital formation within the enterprise.

21/ "Fackföreningsrörelsen och den Tekniska Utveklingen", Bokförlaget Prisma, Stockholm 1966, p. 200.

21/ J.P. Grandezzi, Research Department of the CGT-FO in "Joint Consultation and Co-Determination of the Works Councils in Western Europe", op. cit., p. 72.

22/ Ibid., p. 73.

23/ "Fackföreningsrörelsen och den Tekniska Utveklingen", p. 202.

24/ Ibid., p. 203.

25/ Typical for this is the submission of a "Social Plan" submitted in December 1968 by the European Committee of the Metalworkers' Union in the countries of the Common Market to the Commission of the European Community to protect steelworkers in the case of loss of employment and income.

CHAPTER VI

CONCLUSIONS

In the body of this paper the relevance of European experience to Canadian industrial relations problems was treated by implication rather than by direct reference: by choice of subject matter rather than by discussing the practical applicability of specific laws, institutional arrangements or methods and techniques within the Canadian environment. Too often has it happened that visitors to certain European countries have brought home suggestions and proposals apparently based on the experience of these countries but taken out of the context of their total environment.

If, nevertheless, in the following an attempt is being made to highlight certain areas of foreign experience, it is far more for the purpose of raising questions than by trying to provide immediate answers, whereby the choice is limited to those areas where, despite fundamental differences, the practical application of foreign experience appears worthy of consideration.

1. At various points in this paper reference has been made to the importance in a number of European countries for industrial relations in general and collective bargaining in particular, of institutions which bring these relations under the umbrella of predetermined economic and social policies in the formulation of which labour and management are associated.

For our highly pluralistic society (not least reflected in our political institutions) with its far more diffuse process of decision making, the relevance of this experience is hardly to be found in the attempts made from time to time to force collective bargaining into the framework of wage and price policies based on more or less precise macro-economic measurements, only to be broken time and time again by forces beyond the control of the parties; it is rather to be found in the information and educational effect of continuing discussion and consultation which then permeates the relations process and through which objectively established facts accepted by all parties are brought to bear on the climate and performance of actual negotiations. The development of such institutions has also started in this country, particularly during the last decade or so, and deserves every furtherance by government and the parties of the labour market on the national, regional and eventually also at the industry level.

2. While European experience indicates the importance and in many instances the success of these institutions, it should be noted that at the enterprise and plant level joint consultative bodies have been less effective, particularly in medium-sized and smaller plants despite many years of experimentation and in most countries the undoubted good will of organized management and organized labour.

Given the nature of enterprise, the plant-level employer-employee relationship poses problems which are indeed universal in market economies. A summary of European experiences may, therefore, be regarded as relevant and pointing in the following direction:

- Institutional arrangements for consultation and communications between management and the work force within the enterprise have to have clearly established and jointly agreed to objectives;

- Consultation and communications between plant management and plant labour require intermediary elective bodies that are part of the regular administrative and decision-making process, but which are flexible enough institutions to be adopted to the specific character of the industry and of each enterprise;

- While a clear distinction is generally made between the functions of these plant-level bodies and the traditional and/or legal functions of the trade unions in relation to management as well as their membership, it is also more and more recognized that the unions and their plant-level representatives must be actively engaged in the promotion and operations of these bodies if conflicts of interest and loyalties are to be avoided and the activities of these bodies fitted into the management-union contractual relationship;

- The respective rights, duties and procedures, as well as the areas of information, consultation and decision making under the jurisdiction of these plant-level institutions have to be agreed upon in considerable detail and machinery established for the solution of possible disputes arising from their operations. In other words, the establishment of these institutions should be a matter of formal contract between unions and management subject to the same rules and procedures as any other collective agreement;

- Plant-level institutions can only operate well if there are continued educational efforts made enabling their membership to evaluate the information received and reach conclusions there-from. This involves costs in terms of time and money for which the responsibilities have to be contractually assessed.

3. Given the absence of any formal rules in Europe concerning union recognition and of specific legally prescribed procedures in establishing bargaining units, there seems to be no obvious relevance of European experience to Canadian conditions and problems in this field. On the other hand, if our Canadian procedures were to be recognized as restrictive in the sense that the requirements of the legislations now in force may put limitations on the spread of collective bargaining rather than encouraging it, then certain European experiences could become relevant since a number of European countries had to deal in one way or another with the question of union multiplicity. The difference in the nature of union

multiplicity in Canada and the European type of multiplicity has been noted. Nevertheless, ideological differences between unions in Canada play a role at least regionally, and in this respect the attempts of the Italian and, above all, the Swiss legislation described in the body of the paper, may have some relevance if not as to the details of these legislations but as to their intent.

4. Concerning the exclusion of certain categories of employees from the right to organize and bargain collectively, we noted the emphasis laid in Europe on the universality of freedom of association for the purpose of protecting economic and social interests to the extent that it has entered international and national basic law. This means that there are no legal impediments to unionization and collective bargaining of the labour force regardless of function and status.

The growth in recent years in the unionization of managerial, semi-managerial and professional personnel was noted. The question whether managerial and semi-managerial personnel may belong to the same union as those whom they supervise does not appear to be uniformly answered. Swedish law, for example, makes it possible for the employer to demand a contractual obligation that such personnel may not belong to the same union as the other employees. For the Swedish public service the law requires simply that those who represent the administration in negotiations may not hold office or otherwise be actively engaged in union business but does not prevent membership in the union as such.

5. At first glance there also seem to be no points of contact and comparison between the problems of the centralized organization-to-organization relation systems prevalent in Europe and our problems of fragmentation of the bargaining process.

However, we also noted that for broad sections of the European industrial labour force the centrally arrived at collective wage agreements have only limited normative character and that, when it comes to the actual determination of earnings, the process as well as its results are just as fragmented as here; and wrought with such uncertainties that centralized bargaining in a number of countries has reached a state of crisis. Moreover, we also noted the twin tendencies of centralized relations systems to shift the locus of decision making steadily away both from the individual employer and from the trade union membership as well as to increase the danger of broadening the conflict area. This may have been amongst the factors in lessening the incidence of open conflict but has been bought rather dearly by other disadvantages. Moreover, the danger of broad conflicts threatening whole sectors of the economy has had in certain countries the consequence of politicising the bargaining process by throwing it into legislatures.

If centralization of the relations process and in particular of collective bargaining is not the panacea as it is sometimes made out to be, this does not mean that it would not be very desirable to remove from our legislations the impediments that prevent or make more difficult poli-party, multiplant and multi-union bargaining in accordance with the characteristics, the degree of concentration, the geographic distribution and the changes in the structure of the industries concerned.

In any case, all European experience shows that changes in organizational structures and the emergence of new institutions seldom come about by sudden acts of will but rather by building upon and remodeling existing ones in response to the needs as they arise. This is one of the reasons also that legislation should be flexible enough to permit gradual accommodation to new situations. The major institutional changes which have occured in certain

European countries since World War II were primarily the result of external pressures under emergency conditions, such as the war itself and the demands of post-war reconstruction.

Given this experience, and given the absence of such emergency pressures, it is hardly likely that industrial relations in Canada are in the throws of an institutional revolution. However, there are many intermediary stages between all-out centralization and all-out fragmentation, such as the co-ordination and synchronization of the bargaining process, through union mergers, multi-union policy committees, joint bargaining, etc., all of them already being within the practical experience of our industrial relations system. There are a number of advantages of centralized relations and bargaining which can be obtained without all-out centralization and are entirely compatible with the highly desirable preservation of the collective agreement at the enterprise level.

6. It was also noted that in a number of European countries centrally arrived at agreements on working conditions and specific industrial relations problems concluded separately from wage agreements have steadily gained in importance. Their greatest advantage seems to lie in the fact that such separation permits to deal and experiment with long-range issues of a more fundamental character (technological change would be an example) without delaying and encumbering wage bargaining proper; and furthermore that such agreements could serve, as they do in a number of European countries, to spread the burden of certain social costs more evenly over larger sections of the economy thus permitting the participation of medium and small sized enterprises and in this way reducing existing inequalities in the protection of the labour force.

Undoubtedly such separation of long-range issues from wage bargaining proper would make it more difficult to maintain so-called "package" deals which treat wages, fringe benefits and provisions on working conditions as interrelated and interchangeable points of bargaining. However, does not the question arise whether this type of bargaining approach is any longer capable of dealing with the more fundamental and complex issues of industrial relations? The technique of the Swedish "central agreement" system which makes such agreements recommendations to the actual bargaining partners would tend to preserve the enterprise agreement character of the large majority of our contracts. An incipient trend towards such types of agreements is already established in certain industries and regions of Canada and could well find wider application.

7. The experience of a number of European countries also points to inherent limitations on collective bargaining.

Such limitations may have both qualitative as well as quantitative aspects. In Canada the coverage by collective agreement corresponds to roughly one-third of the labour force. Even if Canadian union membership were to double tomorrow, and with it the coverage by collective agreement, it would still leave a large section outside contractual protection. It is true that relatively little is known of the extension effect of collective agreements on the wages, fringe benefits and working conditions of the non-unionized labour force. The feasibility and desirability of legal contract extension as it is applied in a number of European countries may be doubtful. However, in one form or another, unless as in Sweden, such a high degree of contractual protection is achieved that this becomes largely unnecessary, public policy has to step in with labour standards and minimum wage legislation to

avoid a constantly widening gap between contractually protected and contractually unprotected segments of the labour force. At present the procedures in changing minimum wages, for example, are highly cumbersome and their adjustment follows only with a considerable time lag contractual wage increase. The continuation of such inequalities may have very dangerous consequences.

Moreover, European experience throws some doubt on whether collective bargaining alone can, under all circumstances, deal with the more fundamental and long-range issues of our industrial society. Technological and structural change and with it the social responsibility of the enterprise to the community as a whole is perhaps the most significant question at this time. The considerably greater development and broader application of public policy in these areas does in many European countries remove or reduce as matters of priority a number of issues which burden collective bargaining in Canada.

What is involved here is obviously not only a matter of fiscal policy but has also strong ideological implications. However, neither considerations of fiscal policy nor of ideology can detract from the fact that the present limitations of Canadian labour standards and social security legislation greatly complicates the bargaining process. Furthermore, given the applicability of collective bargaining to a minority of the labour force, the more collective bargaining becomes concerned with social security matters, the more the inequalities in the treatment of the labour force may emerge with the possibility of further increasing social tensions. This is particularly relevant where employer resistance to union organization and collective bargaining, as well as objective difficulties in organizational activities, make the question of unionization in many instances by no means a matter of voluntary choice either by the unions or by the potential membership.

All this is not to be understood to mean that there are any issues affecting the labour force which should be excluded from the bargaining process but only that the process alone cannot under all circumstances be relied upon to deal adequately and in justice to all sections of the labour force with all the issues that are arising.

8. Most European countries distinguish explicitly or implicitly between conflicts of rights and conflicts of interest. In practice this has meant that in matters of collective bargaining and disputes arising from the bargaining process itself, the parties are largely left to find their own way of accommodation. Coercive measures such as compulsory conciliation and arbitration appear more as remnants of the early post-war wages and price control systems rather than as new approaches to industrial disputes questions. Indeed, as we have seen, the European Social Charter obligates governments to promote the concept of voluntaryism in industrial relations. In the majority of countries, whether or not the parties want to make use of the public conciliation and mediation machinery is left to them, and it was noted that in some instances the arrangements and machinery created by the parties themselves have become more important than public machinery. However, where the public conciliation and mediation machinery has worked best, the precondition for this success has been the flexibility of the legislation under which it operates, leaving wide powers of discretion to the mediators and the parties themselves and, above all, the existence of a professional, highly trained and experienced corps of mediators fully trusted by all parties.

9. One of the remarkable facts of the European labour scene has been (with the exception of France and Italy) the very low incidence of open

industrial disputes for nearly a quarter of a century. The presence or absence of open industrial conflict is a much too complex phenomenon and too closely linked to the political, economic and social climate of each country to lend itself to simplistic conclusions. Certainly, as Kahn-Freund remarks, the interest of the law in this area stands in no relation to the actual incidence of such conflicts. Nor does there seem to be any correlation between any particular industrial relations system and such incidence as the fact shows that despite the many variations in these systems, open industrial conflict has been equally rare in a large majority of these countries. Perhaps the only really valid conclusion which can be drawn from European experience is that the existence of a strong, well organized trade union movement which is accepted by government and management as an integral and indispensible part of the economic and social fabric of the nation and has been able to establish a reasonable balance of power with its managerial counterpart, provided the best guarantee for industrial peace. Nevertheless, there are signs that the motivations which inspired the present industrial relations system, may well be weakening. Habits of thought and institutions based upon the experience of a generation which has seen the mass unemployment of the thirties, and had to deal with the economic problems of war and of post-war reconstruction, may still retain their influence, but it certainly would be premature, to say the least, to trust in the belief that the strike as a weapon in settling conflicts of interest has become obsolete even in those European countries in which it is at present only rarely resorted to.

10. In the case of conflicts of rights, whether arising out of collective agreements or of law, there has developed in a number of countries a preference for settling and adjudicating such disputes by special tribunals—

labour courts. In most instances they are partially composed of lay judges nominated as interest representatives of labour and management, the basic idea being that in industrial disputes of any kind reconciliation between the parties must come before adjudication and that, therefore, the judiciary process should be in the hands of persons who, by training and experience, are well versed in the process of industrial relations. We have even seen that in some instances the professional competence of the members of these courts are not judged on the basis of the quality of their judgments but on the basis of the number of cases where the parties could be reconciled without judgment having to be rendered. It was also noted that in a number of countries where originally strong objections have been raised against the introduction of such courts, especially on the part of labour, they have become accepted because their mixed composition has put them above suspicion of social bias.

At the present time the nearest equivalent in Canada to such courts are the Labour Relations Boards. Given the positive experience with Labour Courts in Europe, the question may then be raised whether it would not be possible and advisable to widen the competence of the existing Boards or to create similar institutions through which conflicts of rights in industrial relations matters would be removed from the competence of the ordinary courts.

11. In matters of law enforcement, it seems to matter little whether trade unions are legal entities or not. On the basis of the experience of individual countries it could well be argued that obligations established under the law may force trade unions as well as management organizations to strict methods of internal discipline as they are reflected in their constitutions and by-laws. Comparisons between countries may well establish,

however, that private law enforcement has surpassed public law enforcement in practical importance, regardless of the legal status of the organizations. This seems to be true above all in countries where the chief agents of the industrial relations systems are strong labour market organizations on both sides. On the other hand, it should be noted that where such a balance of power is missing, and where in particular the trade union movement is weak and divided, the underlying social unrest and frustrations will make public law enforcement ineffective and, indeed, lead to mass defiance of the law.

12. In the field of public service employment, European experience suggests the following:

(i) The incidence of open conflict in the public services is closely related to the incidence of industrial conflict in society as a whole.

(ii) Once again, there is no correlation between the right to strike and its actual incidence. Countries which acknowledge the right to strike, tacitly or otherwise, do not show any greater incidence of strike actions than those which deny the right to strike to certain categories of public servants, provided an orderly process of collective bargaining has been established. In that respect the Swedish and Canadian legislations, which almost at the same time radically broke with long established traditions and closely approximate conditions prevailing in the private sector, appear exemplary. In both countries it had to be expected, though, that there would be initial difficulties and friction which can only be overcome by time and experience.

(iii) Conversely, the absence of the right to strike, whereby it should be observed that in a number of European countries the denial of

the right to strike is related not to any specific function, nor to the position the employee holds in the hierarchy in the public service, but to the status of an "established" civil service, leads to the development of different forms of pressures such as the "work-to-rule" and "go-slow" which has proven to be far more difficult to prevent by legal means than actual strikes.

(iv) There is often a catch-up process at work in public service employment due to the fact that traditionally the public service provided certain attractive features now no longer the prerogatives of these services but otherwise inferior wages and working conditions. Once this catch-up process has been concluded and experience on both sides gained in collective bargaining, the incidence of open conflict is likely to decline.

(v) The tendency to assimilate the industrial relations process in the public services to that prevailing in the private sectors was noted as a universal trend. This should not be understood, however, to mean that the experiences gained in the private sector are automatically transferable to the public sector. Services, the discontinuation of which has an immediate and direct impact on the public at large, are also usually those that are run by government as a monopoly or quasi-monopoly, or where monopoly rights have been granted to private employers. Indeed, in the matter of service disputes, what is decisive is not what kind of employer but what kind of function. The monopoly function establishes a particular obligation on the part of the monopoly holder to see that the continuity of the service is maintained. The ineffectiveness of compulsory features as well as the recognition

that public opinion plays a far greater role in regard to the disruption of monopoly services than in other sectors of the economy, implies that both employer and employees have to forego the exercise of certain rights even if they are legally entitled to them. This means that the monopoly holder cannot insist on the unilateral right to undertake changes in working conditions and work organization, even if this right persists in other sectors of the economy; nor can the unions make as free use of economic sanctions even where they have the legal right to do so. This then requires that compensatory preventive features be built into the relations system. In that respect, the various forms of consultative machinery at the various levels of public services which characterize the relations systems of public service institutions in most European countries, appear to have proven highly effective and worthy of attention and study.

APPENDIX

TENDANCES MANIFESTEES PAR LES REGIMES DE RELATIONS DU TRAVAIL EN EUROPE CONTINENTALE

RESUME

CHAPITRE I: INTRODUCTION

Le régime des relations du travail est si intimement lié à la structure économique, sociale et politique d'un pays que c'est dans ce contexte général seulement qu'il faut l'étudier. C'est aussi l'une des difficultés les plus manifestes pour celui qui veut comparer le régime des relations du travail d'un pays avec celui d'un autre. On ne doit jamais présumer que les lois et les institutions, les méthodes et les techniques de relations du travail qui conviennent bien à un pays et qui sont fondées sur une idéologie attirante pourraient aussi convenir à un autre pays. Il ne faut donc pas se demander simplement si l'expérience d'un pays profiterait à l'autre mais il faut plutôt chercher à savoir à quels besoins communs elle répond. Ce serait certes une erreur grave que de confondre la convenance de l'expérience d'un pays à un autre et la transmissibilité des lois, des institutions, des méthodes ou des techniques de chacun.

Depuis la Seconde Guerre mondiale, la plupart des pays de l'Europe occidentale et septentrionale, sauf la France et l'Italie, ont connu de longues périodes de paix sociale relative, et cela en contraste frappant avec

leur histoire agitée dans ce domaine au début du siècle. Il s'agit là d'un fait qui impressionne naturellement l'observateur nord-américain. Notons aussi quelle envergure on tente de donner aux objectifs d'ordre économique et social, soit le plein emploi, la stabilité relative des prix, une situation viable de la balance des paiements et une juste répartition des revenus croissants, et comment ces objectifs semblent s'intégrer au processus des relations du travail; en fait, il faut voir jusqu'à quel point la négociation collective se rattache aux programmes établis pour atteindre ces objectifs et auxquels les parties intéressées peuvent, dans la plupart des cas, participer activement.

Vu le contraste que présente la situation actuelle avec les premières tentatives de relations patronales-syndicales dans ces pays, on peut se demander à juste titre comment le changement s'est produit. La chose ne s'explique pas facilement. Toutefois, on peut peut-être attribuer le changement à la répercussion des événements qui se sont produits à partir de la grande crise économique des années trente jusqu'à la Seconde Guerre mondiale et même par la suite durant la période de reconstruction. Le chômage général, l'avènement des régimes totalitaires, la guerre et le besoin de reconstruire une économie ébranlée restent gravés dans l'esprit des Européens chargés de prendre les décisions même si, dans la plupart des pays, le chômage a fait place au plein emploi, les régressions économiques ont été de courte durée et de peu de conséquence et si, depuis un quart de siècle, l'Europe occidentale et septentrionale connaît une période de croissance économique remarquable et de prospérité sans précédent. Cependant, il s'est produit aussi ce conflit d'objectifs propre à toute société industrielle, c'est-à-dire entre l'objectif du plein emploi et celui de la stabilité relative des prix. C'est cette opposition d'objectifs qui a surtout préoccupé

les gouvernements, le patronat et les syndicats durant l'après-guerre. Elle a aussi mené à l'instauration, dans la grande majorité des pays d'Europe, des régimes modernes de relations du travail qui ont remplacé les régimes traditionnels. Mais ce serait une fausse interprétation des faits de prétendre que les régimes traditionnels ont disparu comme par enchantement, ou qu'ils ne peuvent réapparaître.

CHAPITRE II: LA STRUCTURE DES INSTITUTIONS

Tout régime de relations du travail doit fonctionner dans le cadre de certaines lois. Toutefois, une simple comparaison des régimes révélera qu'il ne faut jamais confondre un ensemble de lois avec le régime même. C'est plutôt dans le jeu et l'action réciproque du changement économique et social et de la loi en tant qu'énoncé d'une politique gouvernementale que l'on peut discerner les tendances les plus significatives dans l'évolution des relations du travail.

Etant donné le lien étroit qui existe entre la liberté d'association et les droits politiques dans l'histoire du syndicalisme européen, il est facile de comprendre pourquoi ce dernier veut ancrer le principe de la liberté d'association dans le droit national et dans le droit international, non seulement parce qu'il s'agit d'un principe de droit civil mais parce que c'est un principe qui s'applique à tous les travailleurs pour qu'ils puissent améliorer leur situation économique et sociale. En fait, c'est dire que la liberté d'association est maintenant un droit universel pour tous les travailleurs tant du secteur public que du secteur privé, quelle que soit leur fonction ou leur position sociale. Tous les autres droits des travailleurs découlent donc de la liberté d'association. (La Charte sociale européenne l'indique clairement.) 1/

Si le droit universel d'association est devenu un des principes fondamentaux de la législation du travail en Europe, la possibilité qu'il empiète sur les droits de l'individu est une question qui a connu des interprétations plutôt variées et nuancées. A toutes fins pratiques, il s'agit ici de sécurité syndicale. Généralement parlant, les législations européennes désapprouvent l'insertion de clauses de sécurité syndicale dans les conventions collectives. Toutefois, on ne peut décider par des mesures législatives de les insérer ou non. Pour une raison ou pour une autre, et par tradition les syndicats européens n'ont pas donné la même importance à la sécurité syndicale que les syndicats nord-américains.

Certaines différences fondamentales qui existent entre les régimes nord-américains et européens de relations du travail concernent les structures du syndicalisme et du patronat. Le syndicat d'industrie est assez tôt devenu la structure dominante bien que non exclusive, tandis que le syndicat de métiers perdait son influence d'importante organisation. De plus, au tournant du siècle, les divers groupements syndicaux ont commencé à se réunir en fédérations nationales et, à leur tour, les patrons ont formé des associations nationales. Ainsi, assez tôt, les relations du travail ont adopté une structure typiquement européenne, fondée sur les relations entre groupements syndicaux, menant à une centralisation qui a favorisé la réunion de syndicats en organisations de plus en plus importantes tandis que le nombre de syndicats particuliers diminuait graduellement.

L'histoire des relations professionnelles en Europe offre une autre caractéristique intéressante: elle ne compte pratiquement pas de conflits de juridiction de métiers, fait d'autant plus remarquable que le syndicalisme n'a nullement empêché les syndicats de se multiplier dans plusieurs pays.

Mais cette pluralité revêt en Europe des caractères distincts. La division peut se produire sur le plan politico-idéologique (comme par exemple, en Belgique, en France, en Italie et en Hollande) ou sur le vaste plan socio-économique (travailleurs industriels, cols blancs, travailleurs professionnels et personnel administratif), comme c'est le cas en Suède, ou sur les deux plans à la fois. Paradoxalement, le conflit idéologique n'engendre plus le conflit juridictionnel et l'on constate, dans les syndicats de travailleurs, que les divisions sur le plan idéologique s'estompent graduellement. Toutefois, il est de plus en plus évident que le conflit classique au sujet de la représentation cède la place au conflit salarial. C'est une conséquence de la structure fondée sur les relations entre groupements syndicaux. La négociation centralisée n'est peut-être pas la cause de ces rivalités, mais elle aide à les mettre à jour.

La création, au tournant du siècle, d'associations d'employeurs bien organisées est l'un des faits saillants de l'histoire des relations du travail en Europe. Dès lors, ces relations étaient des relations entre deux pouvoirs centralisés, auxquelles étaient nettement subordonnées les relations entre patrons et syndicats d'un même établissement. En outre, le pouvoir politique organisé de part et d'autre augmentait d'autant cette centralisation.

CHAPITRE III: LE PROCESSUS DE LA NEGOCIATION COLLECTIVE

Les régimes de relations du travail en vigueur en Europe n'offrent pas d'équivalent du procédé d'accréditation ni de l'unité de négociation statutaire. De façon générale, notons qu'en Europe continentale, la législation sur la négociation ne vise pas à régler les détails des modalités de

la négociation mais plutôt à en établir un cadre juridique large. A toutes fins pratiques, par conséquent, les organes de négociation émanent plutôt des relations entre les deux pouvoirs en cause et de leur acceptation mutuelle et définitive que d'une méthode prescrite par la loi. On peut toutefois restreindre la liberté de choisir l'agent négociateur en précisant, par exemple, dans la loi, "l'association la plus représentative" ou quel genre d'association peut être habilitée à conclure des conventions collectives. On peut aussi, dans la loi, traiter des effets divers de la pluralité des syndicats sur la validité du contrat.

En Europe, les conventions collectives étant dans l'ensemble le résultat des décisions à large optique de pouvoirs centraux qui établissent les normes pour de vastes secteurs de l'économie, sont donc des conventions à contenu minimum en ce qui concerne les salaires et les autres avantages. Dans la plupart des cas, les employeurs individuels et leurs employés n'adhéreront à ces conventions que s'ils jugent nécessaire de réviser les taux de salaires et les conditions de travail contractuels par des dispositions non contractuelles ou quasi-contractuelles. Dans les Etats fédéraux (Allemagne, Autriche, Suisse), la répartition des pouvoirs entre le gouvernement fédéral et les gouvernements provinciaux ne semble pas avoir eu de répercussion majeure sur ce processus de centralisation.

La négociation centralisée, telle qu'elle existe dans la plupart des pays européens, présente à première vue des avantages considérables: structure plus simple de la négociation collective, dépersonnalisation des négociations, occasion d'étudier plus à fond les politiques économiques et sociales. Dans sa forme européenne, elle a toutefois posé des problèmes particuliers en ce qui concerne le processus même et son résultat, la convention collective.

Si la négociation centralisée a pour but d'établir une échelle de salaires plus rationnelle et plus complète, rien ne prouve qu'elle y ait tant soit peu réussi. De plus, les écarts qui existent entre les profits nets de diverses industries et entreprises ont souvent contrecarré le travail des syndicats qui cherchaient à réaliser une plus juste répartition des revenus, ce qui est censément l'un des objectifs de la négociation centralisée. Les rajustements de salaires qui se font au niveau de l'entreprise sont souvent moins sûrs que les conditions stipulées par contrat. En conséquence, on reconnaît de plus en plus, dans certains pays, le caractère peu sûr de ces rajustements et l'on commence à réclamer que l'on trouve les moyens de faire prendre l'engagement contractuel au niveau de l'entreprise et de l'usine.

Dans un régime de relations centralisées, les structures différeront de celles qui existent au Canada. Plus précisément dans le cas de plein emploi, l'échelle de salaires et les conditions de travail contractuels des secteurs organisés influeront automatiquement sur les salaires et les conditions de travail qu'offrent les entreprises et les secteurs qui sont peu organisés ou qui ne le sont pas. Il existe par contre, dans bon nombre de pays européens, une façon légale "d'étendre l'application de la convention collective" c'est-à-dire un moyen de l'appliquer aux employeurs et aux travailleurs qui ne font pas partie des associations qui ont signé la convention. Cette pratique a surtout pour but de protéger les employeurs et les syndicats contre la concurrence d'entreprises et de travailleurs non organisés, et les cas où l'on y a recours varient beaucoup d'un pays à l'autre.

A part la question de l'échelle de salaires qui s'établit de façon peu sûre et au petit bonheur, ce qui, paradoxalement, est l'effet de la

négociation centralisée, deux autres points méritent notre attention. Le premier est le niveau toujours plus élevé où se prennent les décisions dans l'organisation, ce qui semble inévitable, et l'autre, ce que comporte de dangers pour la paix sociale toute mesure visant à étendre les secteurs où pourraient se produire des conflits ouverts.

Si les centres de décision se situent à un niveau toujours plus élevé, il ne s'ensuit pas nécessairement que l'organisation interne des syndicats est de moins en moins démocratique. Cependant, étant donné que seul un petit groupe de chefs prend les décisions finales, les travailleurs ignorent, pour leur part, certains aspects parmi les plus importants de l'activité syndicale. En outre, dans plusieurs pays, il n'existe aucune organisation syndicale efficace pour s'occuper des problèmes au niveau de l'entreprise individuelle. Il en résulte l'apathie et la frustration des membres malgré les efforts énergiques des chefs pour diffuser les renseignements dans les deux sens.

Il est permis de se demander s'il existe un lien entre la centralisation des négociations et le petit nombre de conflits ouverts dans l'industrie. Les associations d'employeurs et de travailleurs sont devenues omnipotentes dans plusieurs pays, ce qui crée des situations où l'on ne peut plus localiser les conflits qui prendraient de telles proportions que leur seule menace a un effet préventif. Il en résulte aussi que l'on a souvent besoin de restreindre l'autonomie respective des syndicats, des associations patronales et des employeurs, ce qui se traduit dans les dispositions restrictives que renferment les statuts des associations. Toutefois, le danger de tels conflits existe toujours avec ce qu'il comporte d'actes ou de menaces d'ingérence politique dans le processus de la négociation. De même, si l'on étend

le secteur où pourrait se produire un conflit, l'intérêt public se trouve d'autant plus directement engagé.

CHAPITRE IV: L'INTERET PUBLIC ET LES CONFLITS DU TRAVAIL

La Charte sociale européenne enjoint les gouvernements signataires de reconnaître le droit de grève comme droit universel (même si le droit de grève ne s'applique pas à certaines catégories de fonctionnaires dans bon nombre de pays). Elle stipule de plus qu'une convention collective peut interdire le conflit ouvert pour la durée de la convention (ce qu'on appelle la "paix obligatoire") et distingue implicitement entre les "conflits de droits" et les "conflits d'intérêts".

Dans la pratique, les pays ont des façons bien différentes de protéger l'intérêt public par mesure législative dans le cas de conflits du travail. De fait, on observe qu'il n'existe aucun rapport entre le nombre d'arrêts de travail et l'élaboration de la législation sur les grèves, ni aucun lien apparent entre l'intérêt manifesté pour cette partie de la législation et le degré de prospérité d'une localité donnée. Il est presque impossible de conclure que l'intérêt public, en cas de conflit du travail, se borne à des considérations économiques, même si ces considérations peuvent parfois prendre de l'importance, mais il faut l'associer à des facteurs impondérables comme la valeur des bonnes relations entre groupes d'intérêts opposés, la loyauté, la justice sociale et le progrès social. A cet égard, la loi ne sert pas souvent l'intérêt public de la façon la plus efficace.

L'universalité du droit de grève telle qu'elle est exprimée dans la Charte sociale européenne doit être envisagée dans le contexte traditionnel

de l'Europe continentale, selon lequel la grève est une arme politique et économique dont les citoyens peuvent se servir en vertu de leurs droits fondamentaux. Ainsi, plusieurs pays d'Europe ont incorporé dans leurs constitution le principe du droit de grève en tant que droit civil fondamental, expressément garanti ou découlant d'autres dispositions relatives aux droits civils. Remarquons toutefois, que dans certains pays, les conventions particulières et même les règlements des syndicats peuvent être plus explicites et plus rigoureux que la loi lorsqu'il s'agit de protéger l'intérêt public.

La distinction entre conflits de droits et conflits d'intérêts est assez bien maintenue dans la législation européenne en matière de différends du travail. Etant donné que souvent les syndicats ne disposent pas des moyens nécessaires pour régler les problèmes au niveau de l'établissement ni pour confier ces problèmes à une organisation locale mais non syndiquée, les tribunaux jouent un rôle très important dans des questions qui au Canada, feraient l'objet de procédures contractuelles. La fonction des tribunaux est d'autant plus importante que la législation des normes du travail est souvent très détaillée et se rattache de près aux conditions réelles de travail, de sorte qu'un manquement à observer l'une de ces normes constitue une infraction à la loi plutôt qu'une simple rupture de contrat. C'est ainsi que plusieurs pays ont établi des tribunaux spéciaux, dits tribunaux du travail, pour régler les conflits de droits. L'accessibilité et la compétence de ces tribunaux varient grandement, mais ils ont ceci en commun: ils laissent le processus de décision au soin de personnes qui, par leur formation et par leur expérience, ont une connaissance pratique des us et coutumes en matière de relations du travail. On y insiste beaucoup sur la réconciliation avant l'arbitrage. A cette fin, les tribunaux du travail sont composés exclusivement ou en partie de profanes choisis parmi des

personnes dont les noms sont soumis par l'employeur et les organisations syndicales.

L'intervention d'une tierce partie dans les conflits d'intérêts est une question beaucoup plus complexe. Presque tous les pays ont établi un mode d'intervention aux fins de la conciliation et de la médiation. Dans la plupart d'entre eux, l'organisme de conciliation et de médiation est ordinairement un organisme professionnel de l'Etat tandis que, dans le cas de l'arbitrage, la tâche est confiée à des groupes de travail dont les membres sont nommés par les deux parties et dont le président est impartial. Il peut y avoir aussi deux organismes, l'un privé et l'autre public, pour le règlement des conflits d'intérêts. En général, on insiste sur le recours facultatif à ces organismes. L'intervention obligatoire d'une tierce partie, là où la chose existe encore, semble tenir à la période de reconstruction d'après-guerre et des contrôles qu'on exerçait à cette époque. L'exhortation à favoriser les modes de règlement facultatifs, qui figure dans la Charte sociale européenne, prend donc de l'importance.

Quant à ce qu'on est convenu d'appeler la paix obligatoire, c'est-à-dire l'obligation d'éviter le conflit ouvert pour la durée d'un contrat collectif, elle n'existe pas dans tous les pays, et là où elle existe, la rigueur en est diminuée par diverses méthodes et divers concepts juridiques.

Pour ce qui est des conflits dans les industries ou services dits "essentiels", la principale difficulté est de trouver une définition acceptable de ce qui est "essentiel" et d'établir à quel point et dans quelles circonstances un inconvénient causé au public devient danger pour la communauté. Il s'agit donc, généralement, de trouver des méthodes et de créer des institutions qui permettraient une intervention spéciale si un tel danger

se présentait. Bien que la question de l'intérêt public en cas de différend dans les services et industries essentiels ne se limite aucunement aux services du gouvernement, plusieurs des services dont l'interruption touche immédiatement de plus vastes secteurs de la population relèvent du gouvernement dans la plupart des pays intéressés. Le règlement des conflits dépendra donc, à bien des égards, des idées qui ont cours dans chaque pays sur le droit de négociation, le droit de grève et les modes de règlement propres au secteur gouvernemental.

Depuis quelques années, dans presque tous les pays, les relations entre employeurs et employés du secteur public ressemblent de plus en plus à celles du secteur privé. Il existe encore en Europe continentale, toutefois, une conception du fonctionnaire selon laquelle certaines catégories d'employés, ceux de la fonction publique établie comme telle, auraient des relations spéciales avec l'Etat, que représentait autrefois le monarque et qui n'est autre maintenant que le peuple souverain représenté au Parlement. Ces relations comportent certains privilèges pour le fonctionnaire mais cela veut dire aussi que ses appointements et ses conditions de travail sont établis par la loi plutôt que par contrat. Cependant, au cours des dernières décennies, même le processus législatif pour établir les salaires et les conditions de travail a pris de plus en plus le caractère de la négociation collective. Ainsi, la détermination unilatérale des salaires et des conditions de travail qui existait à l'origine est devenue une fiction légale même si les conventions entre les autorités et les syndicats de fonctionnaires sont en fin de compte établies dans le cadre de la loi. En même temps s'est accru considérablement le nombre de fonctionnaires qui ne jouissent pas du statut "établi" et qui sont, en loi et en fait, traités exactement de la même façon que les employés du secteur privé, ayant entre autres, le droit de grève,

tel qu'il s'entend généralement. D'autre part, dans certains pays l'opinion veut, et elle figure même explicitement dans la loi, que la catégorie de fonctionnaires qui jouit d'un statut spécial ne puisse faire la grève car ce serait aller à l'encontre des pouvoirs souverains de l'Etat. Notons que ce statut spécial n'a rien à voir avec le poste qu'occupe l'employé dans la hiérarchie de la fonction publique; il s'applique aussi bien au plus humble comme au plus important des fonctionnaires. On a donc établi divers modes de consultation, de conciliation et de médiation, entre autres, l'accès direct des syndicats de fonctionnaires aux réunions des comités parlementaires, où ils forment des groupes de pression politique très efficaces.

Sauf en France, en Italie et périodiquement en Belgique, depuis de nombreuses années, le conflit ouvert dans les services publics est chose très rare en Europe, bien qu'on ait eu recours avec succès, dans certains cas, à la "grève perlée" et à la "grève du zèle". Le fait est attribuable à plusieurs facteurs: le petit nombre de conflits du travail en général, l'expérience acquise de part et d'autre avec les années, l'existence de syndicats puissants et bien organisés, l'efficacité des services de médiation et le respect que l'on témoigne en général à leur égard, la reconnaissance de l'inefficacité de la grève dans nombre de services administratifs, la nécessité pour les syndicats d'obtenir l'assentiment du mouvement syndical avant de faire la grève, dans les cas de conflits qui menacent sérieusement l'intérêt public et, enfin, dernier facteur mais non le moindre, l'existence dans plusieurs pays, au niveau des services et de l'établissement, d'un mécanisme qui permet d'entretenir le dialogue entre la direction et les travailleurs.

CHAPITRE V: CERTAINS PROBLEMES DE L'HEURE

Partout, on veut établir une société fondée sur la participation. Mais, si nous nous intéressons à la question, c'est seulement dans la mesure où les revendications des travailleurs qui veulent participer à la transformation de leur milieu économique et social, ont un effet sur le régime des relations du travail.

Si le problème n'est pas nouveau puisqu'il existe depuis aussi longtemps que le syndicalisme même, c'est depuis la Seconde Guerre mondiale que nombre de pays européens ont fait l'expérience d'institutions en vue d'établir un régime du travail comportant, pour les patrons et pour les ouvriers, des structures pyramidées à partir du niveau de l'entreprise jusqu'au niveau national dans l'évolution des relations du travail en Europe. On cherche en effet à rattacher toutes les relations patronales-syndicales à une politique économique et sociale préétablie, au moyen d'institutions qui d'une part, agissent à titre consultatif auprès du gouvernement et qui peuvent, d'autre part, rendre des décisions de leur propre chef. Les caractéristiques de ces institutions peuvent varier grandement, ainsi que leurs droits et devoirs, mais ce qui importe c'est la participation des organisations patronales et syndicales à l'élaboration de la politique économique et sociale du pays.

Les études préliminaires sur la création de ces institutions sont essentiellement d'ordre pratique et ne révèlent pas beaucoup, dans l'ensemble, l'influence d'idéologies précises. C'est plutôt au niveau de l'entreprise et de l'établissement que diverses idéologies, souvent contradictoires, se sont affrontées de sorte que certaines expressions comme "représentation des travailleurs", "consultation", "congestion", "participation" prêtent très souvent à une confusion sémantique. Quels que soient les objectifs à

longue portée, il semble que toutes les institutions "fondées sur la participation" qui existent au niveau de l'établissement poursuivent les mêmes buts immédiats qui ont un certain rapport entre eux: augmenter l'influence des travailleurs sur leur milieu de travail pour qu'ils tirent ainsi une plus grande satisfaction de leur travail; établir un mode de participation des travailleurs aux décisions administratives qui les touchent; augmenter la productivité; ce qui présente un intérêt commun pour patrons et travailleurs.

Deux genres d'institutions se sont implantées au niveau de l'établissement ou de l'entreprise; on les appelle ordinairement des "comités d'entreprise", sauf lorsque les deux existent côte à côte. Les unes sont fondées sur le principe de "coopération", les autres sur celui de la "confrontation". Les premières comprennent des organismes mixtes, c'est-à-dire formés de patrons et de travailleurs, tandis que, dans le second cas, la direction fait face à des comités composés exclusivement de représentants des travailleurs. Les deux genres d'institutions peuvent être établies par la loi ou par une convention. Dans les pays scandinaves, les comités d'entreprise sont des institutions patronales-syndicales établies par conventions centrales entre les principaux organismes du marché du travail, tandis que, dans les pays de l'Europe continentale, ces institutions sont plus souvent établies par la loi. Les comités d'entreprise à représentation unilatérale, ou comités de représentants des employés remplissent en partie les fonctions d'un délégué syndical mais leurs pouvoirs ne s'arrêtent pas là. En Allemagne et en Autriche, la loi les autorise à conclure certains accords, tandis qu'en Italie, ce droit leur est acquis de fait. Ils ont le droit d'envoyer des représentants aux bureaux de direction de leur entreprise. La loi allemande fait la distinction entre les sphères d'activité où les comités d'entreprise ont le droit d'être consultés mais où l'employeur a toute liberté

d'action même sans l'assentiment du comité, et celles de "cogestion" où la direction ne peut agir qu'avec l'assentiment du comité.

L'étude de la participation des travailleurs en Europe a surtout porté, par tradition, sur le concept de démocratie industrielle, corollaire du concept de démocratie en politique et, par conséquent, sur l'aspect représentation. Cette façon d'envisager le problème a trouvé son expression la plus singulière et jusqu'à un certain point la plus concluante dans la loi allemande de 1950 sur la cogestion qui prévoit la représentation des travailleurs dans les organismes de contrôle et de gestion de l'industrie du charbon et de l'acier. L'application de cette loi aux grandes entreprises industrielles en général compte parmi les demandes du syndicalisme allemand. Ce régime spécial de cogestion, établi en Allemagne au cours de la période d'occupation par les Alliés, trouve son origine dans le rôle historique qu'a joué l'industrie lourde de ce pays dans l'avènement au pouvoir du socialisme allemand. Il est évident que l'on ne peut juger de l'efficacité de ce régime de cogestion indépendamment des formes plus traditionnelles d'activité syndicale non plus que des droits et devoirs des comités de représentants des travailleurs (comités d'entreprise). Quels que soient, pour l'Allemagne, les avantages et les désavantages de ce régime restreint de cogestion, d'une façon générale, le syndicalisme européen ne le favorise pas beaucoup, soit que l'on hésite avec prudence à admettre le principe ou qu'on refuse carrément de l'accepter.

Il est impossible de généraliser sur l'efficacité des comités patronaux-syndicaux au niveau de l'entreprise et de l'établissement. Ces comités varient non seulement d'un pays à l'autre mais aussi d'une entreprise à l'autre, surtout parce qu'elles dépendent des attitudes adoptées par la

direction de chaque entreprise et du degré de participation des syndicats à l'activité de l'organisation. Toutefois, selon certaines indications, la recherche de la solution au problème des relations patronales-syndicales au niveau de l'établissement pourrait bien prendre une nouvelle orientation. On se rend compte que la représentation seule n'assure pas la participation réelle des travailleurs. Il faut donc chercher à trouver un nouveau genre d'institutions qui soient adaptées aux nouveaux concepts de gestion.

Lorsqu'on étudie cette question de l'influence des travailleurs sur les décisions administratives, si l'on a l'impression d'y voir le jeu de diverses idéologies, il n'y a pas de doute que le problème le plus pressant est celui de l'adaptation de l'homme à l'évolution technologique et aux nouvelles structures. Jusqu'à récemment, les problèmes qui se rattachent à tous ces changements semblaient susciter un intérêt plutôt théorique que pratique, au moins dans le domaine de la négociation collective. Cela s'applique peut-être par la situation généralement favorable du marché du travail, par l'augmentation relativement lente de l'effectif de la main-d'oeuvre dans la plupart des pays d'Europe et, en conséquence, par les politiques de l'emploi dont le principal objectif était l'utilisation la plus efficace possible du peu de main-d'oeuvre disponible. Les organisations syndicales européennes tout comme les organisations patronales semblent longtemps avoir eu l'impression que l'effet de l'évolution technologique sur l'emploi allait être si faible et si graduel que les politiques de l'emploi existantes en tiendraient compte.

Ainsi, jusqu'à tout récemment, très peu de conventions collectives, s'il en est, ont traité précisément de l'adaptation à l'évolution technologique. Quant aux effets de l'emploi, notons que la grande importance accordée

à la politique de plein-emploi durant l'après-guerre, a eu de profondes conséquences politiques et juridiques. Certains pays ont reconnu le droit au travail comme droit fondamental de l'homme et, en conséquence, ont pris des mesures législatives qui imposent, dans certains cas, aux employeurs des restrictions sévères en matière de congédiement, sans nécessairement tenir compte de l'évolution technologique.

Cette indifférence relative que l'on a manifestée dans la négociation collective à l'égard des effets de l'évolution technologique sur l'emploi cède peu à peu la place depuis un an ou deux à un intérêt grandissant, et le problème est de plus en plus formulé expressément dans des conventions à l'échelle de l'industrie et même de la nation, concernant le préavis, la formation et le recyclage, divers régimes d'indemnités de départ et de pension de retraite accélérée. Vu les divers groupes d'âge des travailleurs, de nombreuses conventions renferment des dispositions relatives au revenu garanti pour les travailleurs âgés, mais on ne peut pas toujours attribuer directement ces mesures à l'évolution technologique comme telle.

La péréquation des revenus retient aussi beaucoup l'attention dans plusieurs pays d'Europe. Etant donné les inégalités qui existent dans la répartition des revenus, on en arrive à se demander si la négociation collective pourrait contribuer à la péréquation. D'autre part, vu que le revenu du travail, c'est-à-dire les salaires et traitements gagnés, qui forme une tranche du revenu national, est demeuré longtemps remarquablement stable, il faut en conclure que la négociation collective dans sa forme traditionnelle n'a pas été un moyen efficace de péréquation des revenus. Evidemment rien ne nous dit si la négociation a contribué ou non à maintenir cette stabilité de répartition des revenus ou si les politiques salariales des syndicats ont

contribué à une répartition plus équitable des revenus tirés des salaires et traitements entre les diverses catégories de travailleurs. Cependant, voici la question qui se pose: peut-on, par la négociation collective, permettre aux travailleurs de faire des épargnes collectives, c'est-à-dire de s'assurer une part du capital accumulé et d'ajouter ainsi cette nouvelle source de revenu à leur salaire ou traitement.

D'après les divers plans proposés, il ne s'agit pas uniquement d'un problème de péréquation des revenus, puisque, en réalité, la question d'une nouvelle répartition des revenus ne peut être envisagée comme une répartition des traitements et salaires en tant que partie du revenu national ou comme une réduction des écarts qui existent en matière de traitements et salaires. Voici ce qu'on propose: grâce à l'épargne et aux placements collectifs, les travailleurs organisés pourraient devenir copropriétaires de l'industrie et, conséquemment, s'assurer aussi une participation aux décisions administratives.

La participation aux bénéfices, comme telle, n'est pas une idée neuve. En général, par principe, les syndicats européens ne favorisent pas la participation aux bénéfices d'une seule entreprise. Ils ont manifesté plus d'intérêt pour les plans selon lesquels des fonds obtenus de toutes les entreprises d'une même industrie à la suite de négociation collective, pourraient servir à des placements. Mais, même si sur ce point les syndicats européens sont divisés, le principe est toujours à l'ordre du jour.

Une institution nouvelle, la société multinationale offre aussi aux divers groupements syndicaux d'Europe un grand défi à relever. Les politiques des syndicats nationaux sont de plus en plus marquées par ce concept, la façon dont cette société fonctionne, les décisions qu'elle prend sur le

lieu, le genre et les techniques de production, sa tendance à la production en grand et à la spécialisation, à l'unification industrielle, etc. Par-dessus tout, on se demande quelles conséquences peut avoir, dans ces sociétés, le déplacement des centres de décisions qui se situaient auparavant au niveau de la direction locale et qui se situe maintenant au niveau d'un bureau de direction éloigné et inaccessible. Les syndicats européens ont reconnu que les formes existantes de collaboration internationale entre syndicats ne pouvaient relever le nouveau défi. Ils commencent donc à modifier leurs structures et leur tactique de négociation collective. Il s'agit ici, toutefois, de premières expériences en ce sens, et il y aura plusieurs obstacles à surmonter, non seulement du côté de l'employeur récalcitrant mais du côté du syndicalisme même, avant d'en arriver à la véritable négociation collective sur le plan international. Les expériences signifient tout de même qu'il se produit un changement dans les relations entre les divers syndicaux nationaux ainsi qu'une évolution vers des régimes nationaux et internationaux de relations du travail.

CONCLUSIONS

Dans le corps de la présente étude, le rapport entre l'expérience européenne et les problèmes de relations du travail au Canada a été sous-entendu plutôt que mentionné expressément; le choix d'un sujet, plutôt que l'étude de l'application pratique de lois, d'institutions ou de méthodes et techniques précises en milieu canadien, a servi à établir implicitement ce rapport. Les personnes qui se sont rendues dans les pays européens pour y observer la situation dans les domaines des relations du travail en sont trop souvent revenues avec des suggestions et des recommandations fondées en apparence sur

l'expérience de ces pays mais qui ne tenaient pas compte du milieu global dans lequel les relations du travail évoluaient.

Si dans ce qui suit, toutefois, il arrive que l'accent soit mis sur certains aspects de l'expérience à l'étranger, c'est plutôt dans le but de soulever des questions que de tenter de trouver des solutions immédiates. Le choix s'arrête donc à certains aspects qui, en dépit de différences fondamentales, peuvent quand même servir à une étude profitable de l'application pratique des expériences faites à l'étranger.

1. L'étude mentionne à plusieurs reprises l'importance, dans certains pays européens, pour ce qui est des relations du travail en général et de la négociation collective en particulier, des institutions qui rattachent ces relations à des politiques économiques et sociales préétablies conjointement par patrons et syndicats.

Dans notre société hautement pluraliste—nos institutions politiques en témoignent—où le pouvoir de décision est beaucoup plus diffus, cette expérience intéresse moins les tentatives pour faire entrer la négociation collective dans les cadres des politiques de prix et de salaires, cadres établis par des mesures macroéconomiques plus ou moins précises et brisés de temps à autre par des forces indépendantes des parties. L'expérience intéresse plutôt l'effet informatif et éducatif de la discussion et de la consultation permanentes qui caractérisent ainsi le processus des relations et grâce auxquelles des faits objectivement établis et admis par toutes les parties intéressées exercent une influence sur le climat et sur le résultat des négociations. On a commencé à établir ce genre d'institutions au pays, surtout depuis une dizaine d'années, et elles méritent tout l'encouragement du gouvernement et les partenaires sociaux, au niveau national, régional et, espérons-le, à celui de l'industrie.

2. Bien que l'expérience européenne démontre l'importance et, dans bien des cas, le succès de telles institutions, notons qu'au niveau de l'entreprise et de l'usine, les organismes mixtes de consultation ont été moins efficaces, surtout dans les établissements de moyenne ou de moindre importance, malgré des années d'expérience et malgré la bonne foi incontestable des organisations patronales et syndicales dans la majorité des pays.

Compte tenu de la nature de l'entreprise, les relations patronales-syndicales au niveau de l'établissement posent des problèmes qui intéressent toutes les économies de marché. Il conviendrait donc peut-être de résumer les expériences européennes:

— Les institutions qui permettent la consultation et les communications patronales-syndicales au sein de l'entreprise doivent avoir des objectifs clairement définis et admis par les deux parties.

— La consultation et les communications entre employeurs et employés d'un établissement exigent des organismes électifs intermédiaires qui font partie du processus régulier d'administration et de décision, mais qui sont assez souples pour s'adapter au caractère particulier de l'industrie et de chaque entreprise.

— Si l'on fait généralement la distinction entre les fonctions de ces organismes au niveau de l'entreprise et les fonctions traditionnelles et légales des syndicats par rapport à la direction et à leurs membres, il est de plus en plus reconnu que les syndicats et leurs représentants au niveau de

l'établissement doivent activement encourager les initiatives des organismes intermédiaires pour éviter les conflits d'intérêt et de loyautés et faire en sorte que l'activité de ces mêmes organismes fasse partie des relations contractuelles entre patrons et syndicats.

— Il faut établir de façon assez détaillée les droits, devoirs et modes de procédure respectifs de ces institutions au niveau de l'entreprise ainsi que leurs domaines d'information, de consultation et de décision que pourraient causer leurs activités et il convient d'établir aussi un mécanisme pour la solution des conflits. En d'autres mots, l'établissement de ces institutions devrait faire l'objet d'un contrat passé en bonne et due forme entre les syndicats et la direction et soumis aux mêmes règlements et procédures que toute autre convention collective.

— Les institutions au niveau de l'établissement fonctionneront bien seulement si l'on continue de former ceux qui en font partie pour leur permettre d'évaluer les renseignements qu'ils reçoivent et d'en tirer des conclusions. Cela comporte des dépenses de temps et d'argent pour lesquelles les responsabilités doivent être établies par contrat.

3. Puisqu'il n'existe pas en Europe de règlements officiels reconnaissant les syndicats, ni de procédure précise prescrite par la loi pour l'établissement des unités de négociation, l'expérience européenne ne semble pas s'appliquer aux conditions et aux problèmes qui existent au Canada. D'autre

part, si on reconnaissait aux procédures canadiennes un caractère restrictif, en ce sens que les lois en vigueur peuvent mettre obstacle au régime de la négociation collective au lieu de le favoriser, alors certaines expériences vécues en Europe s'appliqueraient au Canada car un certain nombre de pays européens ont eu à régler d'une façon ou d'une autre la question de la multiplicité des syndicats. La différence entre le caractère multiple des syndicats canadiens et celui des syndicats européens a été constatée. Toutefois, les différences idéologiques qui existent entre les syndicats au Canada exercent une influence du moins sur le plan régional et, à cet égard, la législation italienne et surtout la législation suisse, expliquées dans le corps de la présente étude, pourraient peut-être s'appliquer au Canada, sinon le détail, au moins l'esprit de ces lois.

4. Quant à l'exclusion de certaines catégories de travailleurs pour ce qui est du droit de s'organiser et de négocier collectivement, nous avons fait remarquer l'accent qu'on a mis en Europe sur l'universalité de la liberté d'association pour la protection des intérêts économiques et sociaux, au point que le principe est passé dans la législation internationale et nationale de base. C'est dire qu'au point de vue juridique, rien n'empêche la formation de syndicats ni la négociation collective chez les travailleurs, indépendamment de leurs fonctions et de leur position sociale.

Nous avons mentionné l'expansion qu'a prise depuis quelques années l'organisation syndicale des cadres supérieurs, intermédiaires et des professionnels. On ne semble pas avoir résolu de façon uniforme la question de savoir si le personnel des cadres supérieurs ou intermédiaires peut faire partie du syndicat de ceux qu'il dirige. En Suède, par exemple, la loi

permet à l'employeur d'exiger par contrat que ce personnel ne fasse pas partie du même syndicat que les autres travailleurs. Quant à la fonction publique de ce pays, la loi exige seulement que ceux qui représentent la direction dans les négociations n'occupent aucun poste et ne jouent aucun rôle actif dans un syndicat mais elle ne leur défend pas d'en faire partie.

5. A première vue, il semble n'y avoir aucun point de rapprochement ou de comparaison entre les problèmes des régimes européens de relations centralisées d'organisation à organisation et les problèmes que nous posent le fractionnement des unités de négociation.

Toutefois, nous avons remarqué que, en Europe, dans le cas de vastes secteurs de travailleurs industriels, les conventions collectives sur les salaires, qui sont l'aboutissement de négociations centralisées, sont peu normatives, et que, lorsqu'il s'agit en fait de fixer les salaires, le processus et ses résultats sont aussi fractionnés qu'ici et si pétris d'incertitudes que la négociation centralisée dans certains pays a atteint l'état de crise. De plus, nous avons signalé les deux tendances des régimes de relations centralisées: éloigner continuellement le centre de décision de l'employeur individuel et des travailleurs syndiqués et accroître le danger d'un plus vaste conflit. Ces tendances comptent peut-être parmi les facteurs qui ont réduit le nombre de conflits ouverts, ce que l'on a payé cher, si l'on considère les désavantages. Ce danger de vastes conflits qui menaçaient des secteurs entiers de l'économie a eu pour résultat, dans certains pays, de politiser la négociation en la portant devant la législature.

Si la centralisation du processus de relations et particulièrement de la négociation collective n'est pas la panacée que l'on suppose parfois, cela ne veut pas dire qu'il ne serait pas souhaitable de rayer de notre législation

ce qui empêche ou rend difficile la négociation multipartite sur le plan de plusieurs établissements et avec plusieurs syndicats, selon le caractère propre, le degré de concentration et les changements de structure des industries en cause.

De toute façon, l'expérience européenne démontre que les changements de structures et l'apparition de nouvelles institutions sont rarement le fait d'actes de volonté spontanés mais plutôt l'établissement progressif ou la rénovation de celles qui existent déjà, pour répondre aux besoins au fur et à mesure qu'ils se présentent. Voilà une des raisons pour lesquelles la législation doit être assez souple pour permettre l'adaptation aux nouvelles situations. Les changements majeurs qui se sont produits dans les institutions de certains pays d'Europe depuis la Seconde Guerre mondiale étaient d'abord le résultat de pressions exercées de l'extérieur dans des circonstances critiques, par exemple, durant la guerre et durant la période de reconstruction qui a suivi.

Compte tenu de cette expérience et de l'absence de situations d'urgence il est peu probable que les relations du travail au Canada soient en pleine révolution institutionnelle. Toutefois, il existe de nombreuses phases intermédiaires entre la centralisation complète et le fractionnement complet. Ainsi, la coordination et la synchronisation du processus de négociation par l'unification syndicale, les comités d'action représentant plusieurs syndicats, la négociation conjointe, etc., sont autant de moyens qui ont déjà connu une application pratique dans notre régime de relations du travail. Il y a un certain nombre d'avantages à tirer de relations et de négociations centralisées, sans aller jusqu'à la centralisation complète et cela est tout à fait compatible avec la convention collective au niveau de l'entreprise, qu'il est fortement souhaitable de conserver.

6. Notons que, dans certains pays européens, les conventions conclues à la suite de négociations centralisées, qui règlent les conditions de travail et certains problèmes particuliers de relations professionnelles mais qui sont distinctes des conventions collectives de salaires, prennent sans cesse de l'importance. Il semble que ces conventions distinctes permettent de s'occuper des problèmes d'une grande portée et d'un caractère fondamental—l'évolution technologique, par exemple—sans retarder ni gêner la négociation salariale proprement dite. En outre, ces conventions distinctes peuvent servir, comme c'est le cas dans plusieurs pays d'Europe, à répartir plus équitablement certaines dépenses au titre de la sécurité sociale entre de plus vastes secteurs de l'économie, ce qui permet la participation d'entreprises de moyenne et de faible importance et réduit ainsi les écarts qui existent quant au degré de protection accordée aux travailleurs.

Evidemment, si l'on sépare les problèmes d'une longue portée de la négociation salariale, il est difficile de conclure de ces ententes multiples, dites package deals, qui règlent à la fois les salaires, les avantages sociaux et les conditions de travail, comme questions intimement liées et interchangeables. Toutefois, l'on se demande si cette façon de négocier s'applique encore aux questions plus fondamentales et complexes des relations du travail. La technique suédoise de la "convention centralisée" qui consiste à recommander de telles conventions aux négociateurs mêmes, tendrait à conserver à la plupart de nos contrats leur caractère de convention au niveau de l'entreprise. Ce genre de convention s'infiltre; il est même déjà établi dans certaines industries et dans certaines régions du Canada et il pourrait bien se propager davantage.

7. L'expérience européenne indique les lacunes de la négociation collective.

Ces lacunes peuvent prendre à la fois un aspect qualitatif et quantitatif. Au Canada, environ le tiers des travailleurs sont protégés par la convention collective. Même si le nombre des syndiqués canadiens, protégés par une convention collective, devait doubler du jour au lendemain, il resterait encore une grande proportion de travailleurs sans protection contractuelle. Il est vrai que nous connaissons assez peu les effets des conventions collectives sur les salaires, les avantages sociaux et les conditions de travail des travailleurs non syndiqués. Il y a peut-être lieu de se demander s'il est possible et souhaitable d'étendre le contrat légal tel qu'il est appliqué dans certains pays d'Europe. Toutefois, d'une manière ou d'une autre, il faut une politique générale pour fixer les normes du travail et établir une loi du salaire minimum afin d'éviter l'écart grandissant entre les groupes de travailleurs protégés par un contrat et ceux qui ne le sont pas, à moins d'en arriver, comme en Suède, à un degré de protection contractuelle si élevé que cette politique serait inutile. Dans le moment, par exemple, les façons de procéder pour changer les salaires minimums sont bien incommodes et l'on n'arrive à les adapter que longtemps après les augmentations de salaires contractuelles. C'est dire que si ces inégalités persistent, elles auront de graves conséquences.

D'après ce qui se passe en Europe, on se demande si la convention collective seule peut toujours régler les problèmes fondamentaux et de grande portée qui intéressent notre société industrielle. Actuellement, la question la plus importante est peut-être celle de l'évolution technologique et des nouvelles structures qui entraîne la responsabilité sociale de l'entreprise envers la communauté tout entière. En fait, dans plusieurs pays européens, où la politique générale est beaucoup plus avancée et d'une bien plus grande portée, les problèmes prioritaires qui encombrent le régime de la négociation collective au Canada n'existent pas ou sont moins nombreux.

Il ne s'agit évidemment pas seulement d'une question de politique financière, mais aussi d'idéologies puissantes. Toutefois, ni l'une ni l'autre de ces considérations ne peut faire oublier que les lacunes actuelles des normes canadiennes du travail et de la législation canadienne sur la sécurité sociale, compliquent grandement le processus de négociation. De plus, vu que la négociation collective ne peut s'appliquer qu'à une minorité de travailleurs, plus la négociation portera sur des questions de sécurité sociale, plus elle fera ressortir les inégalités de traitement des travailleurs et pourra augmenter d'autant les tensions sociales. Cela est particulièrement vrai si l'employeur s'oppose à l'organisation syndicale et à la négociation collective et s'il se présente des difficultés réelles dans l'activité de l'organisation. Alors, dans bien des cas, la question de l'organisation syndicale n'est plus du tout l'objet d'une décision volontaire, ni de la part du syndicat ni de la part des membres éventuels.

Tout ce qui précède ne veut pas dire qu'il faudrait exclure du processus de négociation certaines questions touchant les travailleurs, mais seulement qu'il ne faut pas se fier sur le processus seul pour régler comme il convient, en rendant justice à tous les groupes de travailleurs, tous les problèmes qui se présentent.

8. Dans la plupart des pays européens, on fait explicitement ou implicitement la distinction entre les conflits de droits et les conflits d'intérêts. C'est dire que, dans la pratique, en matière de négociation collective et en cas de différends qui se produisent durant le processus de négociation même, les parties doivent généralement trouver elles-mêmes une voie d'accommodement. Les mesures de contrainte, par exemple la conciliation et l'arbitrage obligatoires, remontent aux anciens régimes de

réglementation des salaires et des prix de l'après-guerre; ce ne sont pas de nouvelles façons d'aborder les problèmes que posent les conflits du travail. De fait, nous l'avons vu, la Charte sociale européenne oblige les gouvernements à favoriser le volontarisme dans les relations du travail. Dans la majorité des pays, le mécanisme public de conciliation et de médiation est à la disposition des parties qui peuvent y avoir recours ou non, et dans certains cas, l'on constate que les dispositions et les mécanismes établis par les parties elles-mêmes ont pris plus d'importance que le mécanisme public. Mais là où le mécanisme public de conciliation et de médiation a le mieux réussi, le succès est attribuable à la souplesse de la loi qui régit ce mécanisme et qui laisse aux médiateurs et aux parties elles-mêmes de vastes pouvoirs discrétionnaires et surtout à l'existence d'un corps de médiateurs de profession, hautement spécialisés et possédant une grande expérience, ce qui leur assure l'entière confiance de toutes les parties intéressées.

9. L'un des faits remarquables que l'on a constaté dans le domaine du travail en Europe—à l'exception de la France et de l'Italie—est le petit nombre de conflits ouverts qui se sont produits depuis près d'un quart de siècle. L'existence ou l'absence de conflits ouverts est un phénomène beaucoup trop complexe et beaucoup trop lié au climat politique, économique et social d'un pays pour permettre de tirer des conclusions par raisonnement simpliste. Comme le remarque Kahn-Freund, l'intérêt de la loi en ce domaine n'a aucun rapport avec le nombre réel de conflits. Il ne semble pas non plus y avoir de rapport entre un régime de relations du travail en particulier et le nombre de conflits ouverts car, d'après les faits, malgré les différences qui existent entre les divers régimes établis, le conflit ouvert a été tout aussi rare dans la grande majorité des pays. Il y a peut-être une seule conclusion valable à tirer de l'expérience des pays d'Europe et la voici: la

meilleure garantie de paix industrielle est l'existence d'un mouvement syndical fort et bien organisé, reconnu par le gouvernement et par le patronat comme partie intégrante et essentielle de la structure économique et sociale d'un pays, et qui a réussi à établir un juste équilibre des pouvoirs avec sa contrepartie patronale. Il y a quand même des signes d'affaiblissement des motifs qui sont à la base du régime actuel de relations du travail. Les idées et les institutions d'une génération qui a vécu l'expérience de la crise du travail des années trente, de la guerre et de la période de reconstruction exercent peut-être encore leur influence mais il serait probablement prématuré, c'est le moins qu'on puisse dire, de croire vraiment que la grève comme moyen de régler les conflits d'intérêts est désuète, même dans les pays où l'on y a recours que très rarement de nos jours.

10. Dans le cas de conflits de droits, qui ont leur origine dans les dispositions d'une convention collective ou d'une loi, on a recours dans plusieurs pays à des tribunaux spéciaux, dits tribunaux du travail, pour le règlement et l'arbitrage de ces conflits. Dans la plupart des cas, le tribunal est composé de personnes qui ne sont pas des juristes et qui sont nommées pour prendre les intérêts des travailleurs et des employeurs car, fondamentalement, dans tout conflit du travail il faut la réconciliation des parties avant l'arbitrage et, par conséquent, la procédure judiciaire doit être confiée à des personnes qui, par leur formation et par leur expérience, sont bien au courant du processus des relations du travail. Nous avons même remarqué que, parfois, la compétence professionnelle des membres de ces tribunaux n'est pas jugée d'après la valeur des jugements qu'ils rendent mais d'après le nombre de cas où ils ont réussi à réconcilier les parties sans avoir à rendre un jugement. En outre, on a remarqué que, dans un certain nombre de pays où l'on s'opposait fortement au début à l'établissement de

tels tribunaux, surtout parmi les travailleurs, ces mêmes tribunaux, sont maintenant acceptés parce que se sont des tribunaux mixtes que l'on ne saurait donc soupçonner de préjugés sociaux.

Les institutions canadiennes qui se rapprochent le plus des tribunaux du travail, dont il vient d'être question, sont actuellement les commissions de relations du travail. Compte tenu de l'expérience des tribunaux du travail en Europe, il y a peut-être lieu de se demander s'il ne serait pas possible et avantageux d'accorder plus de compétence aux commissions existantes ou de créer des institutions semblables qui permettraient de soustraire à la compétence des tribunaux ordinaires les conflits de droits en matière de relations du travail.

11. Lorsqu'il s'agit d'application de la loi, il importe peu que les syndicats aient la personnalité juridique ou non. Si l'on tient compte de l'expérience des pays respectifs, on peut soutenir que les obligations imposées par la loi peuvent forcer les organisations syndicales et patronales à s'en tenir à une stricte discipline interne qui se traduit dans leurs statuts et règlements. Par contre, si l'on compare les expériences des divers pays, l'application de la loi par des organismes privés semble avoir dépassé l'application de la loi par les organismes publics à toutes fins pratiques, indépendamment du statut juridique des organismes. C'est particulièrement le cas dans les pays où, des deux côtés, les principaux agents des régimes de relations du travail sont de puissantes organisations. Cependant, il convient aussi de faire remarquer que là où n'existe pas cet équilibre du pouvoir, et où, en particulier, le syndicalisme est faible et divisé, l'agitation et la frustration que cela suppose sur le plan social rendre inefficace l'application de la loi par les organismes publics et mènera en fait au mépris général de la loi.

12. Dans le domaine des services publics, voici ce que l'on peut tirer de l'expérience vécue en Europe:

i) Le nombre de conflits ouverts dans les services publics est intimement lié au nombre de conflits du travail en général.

ii) Encore une fois, il n'y a aucun rapport entre le droit de grève et le nombre réel de grèves. Dans les pays où l'on reconnaît le droit de grève, tacitement ou autrement, les grèves ne sont pas plus nombreuses que dans les pays où l'on refuse ce droit à certaines catégories de fonctionnaires, pourvu qu'on y ait établi un processus de négociation collective. A cet égard, on peut citer l'exemple du Canada et de la Suède qui ont, presque en même temps, rompu avec les vieilles traditions et où actuellement la loi tend à établir de façon générale une situation à peu près semblable à celle qui existe dans le secteur privé. Toutefois, dans les deux pays, il fallait s'attendre au début à des difficultés et à des frictions que seuls le temps et l'expérience permettra d'éliminer.

iii) Réciproquement, lorsqu'il n'y a pas droit de grève—ici faut-il signaler que, dans certains pays d'Europe, lorsqu'on refuse d'accorder le droit de grève à un groupe de travailleurs, ce n'est pas en raison de la nature particulière de leur travail ni à cause de la position qu'ils occupent dans la hiérarchie des fonctionnaires, mais à cause du statut d'une fonction publique "établie"—il s'ensuit diverses

formes de pressions comme la "grève du zèle" et la "grève perlée" qu'il est bien plus difficile de prévenir par mesures législatives, que les véritables grèves.

iv) La fonction publique a souvent à se rattraper parce que, traditionnellement, elle offrait certains aspects intéressants qui ne sont plus ses prérogatives et qu'elle offre plutôt des salaires moindres et des conditions de travail inférieures. Lorsqu'elle se sera enfin rattrapée et que les deux parties auront acquis de l'expérience à la négociation collective, le nombre des conflits ouverts diminuera probablement.

v) On a constaté partout une tendance à assimiler le processus des relations du travail dans les services publics à celui des secteurs privés. Il ne faut pas entendre par là que l'expérience acquise dans le secteur privé s'applique automatiquement au secteur public. Les services dont l'interruption touche immédiatement et directement le grand public sont ordinairement ceux dont le gouvernement a le monopole ou le quasi monopole ou dont les droits de monopole ont été accordés à des employeurs privés. Et lorsqu'il s'agit de différend dans un service public, le facteur décisif n'est pas tant l'employeur mais bien la nature du service. Quiconque monopolise un service est par le fait même obligé d'assurer le fonctionnement ininterrompu de ce service. L'inefficacité de mesures coercitives des services monopolisés et le fait de reconnaître que l'opinion publique

exerce à l'égard de toute interruption de tels services, une influence beaucoup plus grande que dans d'autres secteurs de l'économie, impliquent qu'employeurs et employés doivent renoncer à l'exercice de certains droits même s'il s'agit de droits qui leur sont conférés par la loi. Cela signifie que quiconque monopolise un service public ne peut insister sur le droit unilatéral d'entreprendre de changer les conditions de travail et l'organisation du travail même si ce droit est respecté dans d'autres secteurs de l'économie. Les syndicats ne peuvent pas non plus avoir aussi librement recours aux sanctions économiques, même si la loi leur en donne le droit. Il devient donc nécessaire, à titre compensatoire, d'insérer dans le régime des relations du travail, des mesures préventives. A cet égard, les divers organes de consultation qui existent aux différents niveaux des services publics, caractéristiques du régime des relations du travail dans les institutions de la fonction publique de la plupart des pays d'Europe, semblent être très efficaces et méritent que l'on s'y arrête pour les étudier.

NOTE

1/ La Charte sociale européenne a été adoptée par le Conseil de l'Europe à la réunion qu'il a tenue à Turin en Italie le 18 octobre 1961 et elle est entrée en vigueur le 26 février 1965.

NOTES